Supreme Court, U.S.
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No. 97-

In the Supreme Court of the United States

OCTOBER TERM, 1997

AETNA LIFE INSURANCE COMPANY,

Petitioner,

v.

SHERRIE ACE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In reviewing a district court's decision to grant a new trial, the Ninth Circuit applies a "stringent standard" — which the Seventh Circuit has expressly rejected — under which it will not permit the trial court to exercise its discretion to grant a new trial based on the weakness of the evidence, unless the verdict is against the "great weight" of the evidence or is "seriously erroneous," and the Ninth Circuit accords minimal deference to that determination. In this case, which involves a $16.5 million punitive damage verdict based on the alleged "bad faith" denial of insurance benefits worth $27,000, the trial court granted a new trial on punitive damages, but the Ninth Circuit, applying its "stringent standard," reversed.

1. Does the Ninth Circuit's "stringent" rule for new trial orders based on evidentiary weakness —

> which (a) prohibits trial judges from awarding new trials unless the verdict is against the "great" weight of the evidence, (b) subjects such orders to a standard of review more "stringent" than "abuse of discretion," and (c) squarely conflicts with the broader discretion allowed in other circuits

— create an unauthorized barrier to relief from problematic verdicts and excessively intrude on trial judges' discretion to grant new trials?

2. Because this Court has held that the Due Process Clause requires searching post-verdict judicial review of punitive damage verdicts, should the Court also require appellate courts to extend the maximum deference possible under the "abuse-of-discretion" standard, when the trial judge concludes that a punitive award is unwarranted, dubious, or excessive, and orders a new trial?

3. When a court of appeals concludes that a trial judge did not make sufficiently specific findings under Fed. R. Civ. P. 50(c)(1) explaining the grant of a "conditional" new trial, should the proper practice be for the appellate court to remand for more detailed findings rather that to reverse the new trial decision outright and reinstate the original verdict?

RULE 29.6 STATEMENT

Petitioner Aetna Life Insurance Company states that its parent companies and non-wholly owned subsidiaries consist of:

Aetna Inc. (parent)

Aetna U.S. Healthcare, Inc. (parent)

Aetna Chile Seguros Generales S.A. (a Chilean corporation)

Administradora de Fondos de Pensiones Santa Maria, S.A. (a Chilean corporation)

Aetna Capital L.L.C.

Amerin Corporation

Fianzas Monterrey, S.A. (a Mexican corporation)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED I

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

FEDERAL RULES INVOLVED 3

STATEMENT 4

A. Aetna's Evaluation of Ace's Claim For Benefits . . 4

B. The Trial, Verdict, And Post-Verdict Motions . . . 6

C. The Ninth Circuit's Decision 9

REASONS FOR GRANTING THE PETITION 11

I. THE NINTH CIRCUIT'S ERRONEOUS STANDARDS FOR GRANTING AND REVIEWING NEW TRIAL ORDERS BASED ON THE SUFFICIENCY OF THE EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS 14

II. DUE PROCESS REQUIRES SPECIAL DEFERENCE ON APPEAL TO ORDERS GRANTING NEW TRIALS ON PUNITIVE DAMAGE VERDICTS 24

III. IF FINDINGS ARE INSUFFICIENT UNDER RULE 50(c)(1) TO EXPLAIN THE GRANT OF A NEW TRIAL, THE PROPER PROCEDURE IS TO REMAND FOR ADDITIONAL FINDINGS, NOT TO REVERSE OUTRIGHT 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Allied Chemical Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980) 14

Binder v. *Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995) 15

Books v. *Chater*, 91 F.3d 972 (7th Cir. 1996) 28

Browning-Ferris Industries of Vermont, Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989) . . . 14, 25-26

Byrd v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958) 14, 17

Calderon v. *Thompson*, ___ U.S. ___, 118 S. Ct. 1489 (1998) 20

Carter v. *DecisionOne Corp.*, 122 F.3d 997 (11th Cir. 1997) 16

Carter v. *Fenner*, 136 F.3d 1000 (5th Cir. 1998) 16

Chizmar v. *Mackie*, 896 P.2d 196 (Alaska 1995) 12

Collazo-Santiago v. *Toyota Motor Corp.*, No. 97-1365, 1998 U.S. App. LEXIS 15330 (1st Cir. July 9, 1998) 19

Cooter & Gell v. *Hartmax Corp.*, 496 U.S. 384 (1990) 20

EEOC v. *Pape Lift, Inc.*, 115 F.3d 676 (9th Cir. 1997) 16

Gasperini v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996) . . . . . *passim*

General Electric Co. v. *Joiner*, ___ U.S. ___, 118 S. Ct. 512 (1997) 21

TABLE OF AUTHORITIES — Continued

Page(s)

Gutierrez-Rodriguez v. *Cartagena*, 882 F.2d 553 (1st Cir. 1989) 19

Harte-Hanks Communications, Inc. v. *Connaughton*, 491 U.S. 657 (1989) 25

Hetzel v. *Prince William County*, ___ U.S. ___, 118 S. Ct. 1210 (1998) 18, 21

Honda Motor Co. v. *Oberg*, 512 U.S. 415 (1994) 11, 25

Kelley v. *Airborne Freight Corp.*, 140 F.3d 335 (1st Cir. 1998) 19

Kirsch v. *Fleet Street, Ltd.*, Nos. 96-9631, 97-7021, 1998 U.S. App. LEXIS 13516 (2d Cir. 1998) 18

Liddell v. *Board of Educ.*, 20 F.3d 324 (8th Cir. 1994) 29

Lind v. *Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir.), cert. denied, 364 U.S. 835 (1960) 15, 17

McClain v. *Owens-Corning Fiberglass Corp.*, 139 F.3d 1124 (7th Cir. 1998) 21

Medcom Holding Co. v. *Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) 1, 18

Miksis v. *Howard*, 106 F.3d 754 (7th Cir. 1997) 20

Montgomery Ward & Co. v. *Duncan*, 311 U.S. 243 (1940) 1, 14-15, 18

National Hockey League v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976) 20

TABLE OF AUTHORITIES — Continued

Page(s)

NAACP v. *Town of East Haven*, 70 F.3d 219 (2d Cir. 1995) 29

Preferred RX, Inc. v. *American Prescription Plan, Inc.*, 46 F.3d 535 (6th Cir. 1995) 29

Rattray v. *City of National City*, 51 F.3d 793 (9th Cir. 1994), cert. denied, 516 U.S. 820 (1995) 25

Reich v. *Newspapers of New England, Inc.*, 44 F.3d 1060 (1st Cir. 1995) 28

Santa Maria v. *Metro-North Commuter R.R.*, 81 F.3d 265 (2d Cir. 1996) 18

Sheridan v. *E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1995), cert. denied, 117 S. Ct. 2532 (1997) 16

South-Western Publishing Co. v. *Simons*, 651 F.2d 653 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) 28

Spurlin v. *General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976) 16-17

Taylor v. *Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), cert. denied, 396 U.S. 835 (1969) 19, 26

TEC Engineering Corp. v. *Budget Molders Supply, Inc.*, 82 F.3d 542 (1st Cir. 1996) 29

Constitutional Provision, Statutes, and Rules:

U.S. Const., amend. V . . . . . *passim*

28 U.S.C. § 1254(1) 3

AS § 09.17.020 12

TABLE OF AUTHORITIES — Continued

Page(s)

Fed. R. Civ. P. 50(c)(1) . . . . . *passim*

Fed. R. Civ. P. 52(a) 28

Fed. R. Civ. P. 59 25

Fed. R. Civ. P. 59(a) 17, 28

Fed. R. Civ. P. 59(c) 28

Miscellaneous:

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PETITION FOR A WRIT OF CERTIORARI

The jury in this case returned a verdict for respondent Sherrie Ace, finding that petitioner Aetna Life Insurance Company had "wrongfully withheld" nine-months of long-term disability insurance benefits worth $27,000. The jury also imposed punitive damages of $16.5 million on Aetna. The district judge, who had heard all of the testimony and examined all of the exhibits, expressed "surprise" at the jury's punitive damages decision. In a subsequent, detailed opinion, he granted Aetna's motion for judgment as a matter of law on punitive liability. He also granted Aetna's motion under Fed. R. Civ. P. 50(c)(1) for a "conditional" new trial on punitive damages, in the event the court of appeals found the evidence sufficient to preclude judgment for Aetna as a matter of law.

On appeal, the Ninth Circuit reversed not only the judgment for Aetna, but also the district court's "conditional" new trial order. In reversing the award of a new trial on punitive liability, the court of appeals eschewed the "weight of the evidence" and "abuse of discretion" standards propounded and refined by this Court, see, *e.g.*, *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 434 (1996); *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940), in decisions which the Seventh Circuit has expressly ruled do not permit the "stringent" standards applied by the Ninth Circuit. See, *e.g.*, *Medcom Holding Co.* v. *Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1397 (7th Cir. 1997).

Under the correct standards, a trial court may grant a new trial if the verdict "appears" to the judge to be against the "weight of the evidence," and the appellate court in turn is limited to reviewing that assessment for "abuse of discretion."

Instead of following this approach, the Ninth Circuit applied its own more "stringent standard," under which a "district court may order a new trial based on insufficient

evidence only if it finds that the jury's verdict 'is against the *great weight* of the evidence, or it is *quite clear* that the jury has reached a *seriously erroneous* result.'" App., *infra*, 14a (emphasis added; citation omitted). These special constraints deprive federal trial judges in that Circuit (and in several others that follow the Ninth Circuit's tests) of the traditional flexibility to evaluate the "weight of the evidence" and in "the interest of justice" to set aside verdicts that "appear" to be unwarranted.

The erroneous standards applied in the Nation's largest circuit, which several other circuits also follow, is especially pernicious in the context of judicial review of punitive damages verdicts, where the Due Process Clause compels searching post-verdict scrutiny. In punitive damages cases, the trial court has a unique position to view the evidence and to serve as a judicial check on unwarranted or excessive punishment. Its exercise of discretion to order a new trial on punitive damages should be subject to substantial deference under the abuse-of-discretion standard rather than being subjected to the "stringent," and entirely non-deferential, standard applied by the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (App. A) is reported at 139 F.3d 1241. The order of the court of appeals amending its opinion (App. B) is unreported. The original opinion of the court of appeals (App. C) is also unreported. The order of the district court granting Aetna's motion for a conditional new trial on punitive damages (App. D) is unreported. The order of the district court granting, in part, Aetna's motion for judgment as a matter of law (App. E) is also unreported.

JURISDICTION

The original opinion of the court of appeals was entered on April 12, 1998. Acting on timely petitions for rehearing

by both parties, the court of appeals entered an order on May 7, 1998, granting the rehearing petitions in part and amending the court's opinion. The Ninth Circuit treats that date as the date of entry of its judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

The Federal Rules of Civil Procedure provide in pertinent part:

> **Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings**
>
> * * *
>
> **(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion**
>
> (1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. * * *
>
> **Rule 59. New Trials; Amendment of Judgments**
>
> **(a). Grounds.** A new trial may be granted to all or any of the parties on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials

> have heretofore been granted in actions at law in the courts of the United States; * * *.

STATEMENT

A. Aetna's Evaluation of Ace's Claim For Benefits.

The State of Alaska contracted with Aetna to make available to employees, under defined conditions, insurance coverage for short-term disability ("STD") and long-term disability ("LTD"). App. 3a-4a. The State published a benefits booklet that described the terms on which LTD benefits were payable:

> "To receive benefits from this plan, you must be totally disabled. That is, you are unable to work at any gainful occupation due to sickness or injury, and under care of a physician. Medical certification is required." *Id.* at 59a-60a; ER 22.[1]

The "unable to work at any gainful occupation" language describing the standard for LTD benefits was required by the State contract, and is "not common" in Aetna LTD insurance agreements. App. 60a; SER 47, 52.

Sherrie Ace was a loan examiner for the State. App. 3a. In December 1986, Ace injured her knee while sledding. As a result, she required several surgeries by Dr. McEvoy over the next six years. *Ibid.* In April 1992, Dr. McEvoy performed an osteotomy on Ace's knee. Following this surgery, Ace obtained STD benefits from Aetna. When her STD benefits lapsed, Ace applied for LTD benefits in September 1992. *Id.* at 3a-4a.

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[1] "ER" refers to the Excerpt[s] of Record filed by Ace in the court of appeals and "SER" refers to the Supplemental Excerpts of Record filed by Aetna; and "Tr." refers to the trial transcript, identified first by volume followed by page number(s).

With her LTD application, Ace submitted a report from her family physician, Dr. Kiessling, who opined that Ace suffered from "severe degenerative joint disease." App. 4a. He "rated her to be between 30-50% ['capable of light work'] and 50-70% ['capable of clerical/administrative (sedentary) activity'] physically disabled." *Ibid.* Ace's LTD application also included a work release from her orthopedic surgeon, Dr. McEvoy, dated July 27, 1992, authorizing her to perform half-time, light-duty work for six weeks as of August 1, 1992. *Id.* at 3a-4a; ER 99. The surgeon stated:

> "This half time should continue for six weeks after which time she can be converted to full time * * *. After six weeks [I] would anticipate that these restrictions can gradually be diminished and she could hopefully return to a more vigorous level of activity." *Ibid.*

After receiving Ace's submissions, Aetna forwarded the medical records to Dr. Galvin, a medical consultant who reviewed disability benefit claims. App. 5a, 61a; 4 Tr. 116. Dr. Galvin reported that Ace had not established a long-term disability and could perform her own occupation as a loan examiner. App. 5a; SER 156-157.

Relying on Ace's submissions and Dr. Galvin's analysis, Aetna informed Ace on November 17, 1992, that her LTD benefits claim was denied, explaining:

> "In order to be eligible for Long-term Disability Benefits, you must be totally disabled to the extent that you are unable to work at any gainful occupation due to bodily injury or illness. * * *
>
> "The most current medical information we have * * * has revealed that you are capable of performing clerical, sedentary-type employment. Your old occupation as a loan examiner would be considered to be sedentary-type employment. Therefore, we

> cannot consider you as being totally disabled from performing the duties of any gainful occupation as required by the policy * * *." App. 5a-6a; ER 57-58.

Aetna also advised Ace that she was "entitled to a review of this benefit determination," and explained the review process. ER 57-58.

Over the next four months, Ace submitted several requests for reconsideration (App. 6a-10a), which included more materials from her family physician, Dr. Kiessling, and two physical therapists. Dr. Kiessling changed his opinion of Ace's condition, concluding that it "had worsened since his earlier [s]tatement, [and] that she * * * was unable to perform clerical work." *Id.* at 7a. Aetna subsequently advised Ace that she "would have to have her physicians 'furnish . . . objective medical evidence to support [her] contention [of total disability].'" *Ibid.*

Although Aetna did not contact Ace's physicians, her requests for reconsideration were reviewed by, among others, Aetna's medical consultant, Dr. Galvin, who concluded that Ace had failed to submit any "objective medical evidence" to support the conclusion that she was totally disabled. App. 7a-10a. Despite this finding, Aetna did not close the case, but instead asked Ace to undergo an independent medical examination ("IME"). After Ace refused to appear for an IME, Aetna denied her claim. *Id.* at 10a, 61a.

Ace had further surgery on her knee in April 1993 (App. 10a) and "[w]ithin two months, [she] was walking without crutches and returned to work." Her alleged "long term" disability ended June 1, 1993, nine months after she sought the benefit. *Ibid.*

B. The Trial, Verdict, And Post-Verdict Motions.

Ace sued Aetna, alleging that Aetna had denied her LTD benefits claim in "bad faith" and that Aetna was liable for

compensatory and punitive damages. App. 2a. After a seven-day trial, the jury returned a verdict finding Aetna liable for the tort of "bad faith" and awarding $27,009 in damages for the "wrongful denial" of LTD benefits, $100,000 in emotional distress damages, and $16.5 million in punitive damages. *Ibid.* Once the jury was discharged, the district court expressed "surprise" (7 Tr. 35-36) at the jury's punitive damage award.

Aetna then filed a motion for judgment as a matter of law under Fed. R. Civ. P. 50 on its tort liability for bad faith and its liability for punitive damages. App. 49a, 51a. The court denied Aetna's motion for judgment on the issue of bad faith liability, finding that "a reasonable jury could have concluded that Aetna breached its obligation to deal fairly and in good faith with Ace." *Id.* at 58a-59a. The court stated:

> "Although it is a close question, particularly in light of the fact that where an insurer has an objectively reasonable basis for denying a claim the denial does not constitute bad faith, * * * this court concludes that when all the evidence is viewed in the light most favorable to Ace, a reasonable jury could have found that Aetna acted in bad faith by not promptly making some affirmative inquiry after receiving Dr. Kiessling's second opinion. * * *" *Ibid.*

Turning to the question of Aetna's liability for punitive damages under Alaska law, which requires "clear and convincing" proof of "outrageous" behavior, the court ruled in Aetna's favor. App. 59a. The court first specifically rejected Ace's argument that the "any gainful occupation" language used in the policy issued by Aetna could support punitive liability here. *Id.* at 60a. Although this language sets a "standard far higher than the law would allow Aetna to enforce literally," this:

> "* * * was not language inserted into a policy presented to an individual insured on a take it or

> leave it basis. The language was contained in a contract between Aetna and a state government. The language was not actually employed by Aetna to deny benefits to Ace. Ace's qualification for disability benefits turned upon whether she was able to go back to work at her own job. That this was the central issue was clearly known by all the Aetna personnel involved in handling the claim. Whatever might be said about quoting back the 'any gainful occupation' language in some other context, it is unreasonable to conclude that on the facts here it shows any malice toward Ace." *Ibid.*

Finally, the court concluded that the "manner in which Ace's claim was actually handled in terms of the information available to Aetna at each step in the process," could not support an award of punitive damages:

> "At all times, Aetna had knowledge of Dr. McEvoy's opinion which, given his role in Ace's care [as her orthopedic surgeon], was never persuasively contradicted by any other information. Moreover, the lay claims personnel referred the medical information to a qualified physician, Dr. Galvin, for review. He found no basis for concluding Ace was disabled. Despite Dr. Galvin's opinion, Aetna did make arrangements for an IME. Surprisingly, Ace declined the IME. * * *
>
> "* * * Plainly put, there is nothing outrageous about relying on the opinion of the most knowledgeable physician, Dr. McEvoy, to the exclusion of what little contrary indication of Ace's condition had emerged prior to asking for an IME, the one procedure that could be expected to clear up any uncertainty." App. 61a-62a.

Aetna also moved under Fed. R. Civ. P. 50(c)(1) for an order "conditionally" granting a new trial on punitive

damages, if a reviewing court disagreed with the judgment in Aetna's favor as a matter of law. In supporting that motion, in addition to offering four reasons why the amount of damages was excessive, Aetna presented three distinct arguments why a new trial on punitive *liability* was warranted:

(1) the verdict was "against the weight of the evidence,"

(2) the verdict was tainted by "unduly speculative" expert testimony, and

(3) Ace's counsel in closing argument had made an improperly inflammatory reference to extra-record, unrelated cases against other companies.

See generally Memorandum of Law in Support of Aetna's Motion for a New Trial, filed July 18,1996.

After considering the extensive briefing on this motion, the district judge granted Aetna a conditional new trial on punitive damages, finding:

> "In general, the court agrees with the arguments advanced by defendant [Aetna] and therefore grants the motion for a new trial as to the claim for punitive damages such that if the court of appeals should reverse this court's decision [granting judgment to Aetna notwithstanding the verdict] on the punitive damages claim there will be a new trial on that claim." App. 49a

The court rejected Aetna's motion for a new trial on its underlying tort liability. *Ibid.*

C. The Ninth Circuit's Decision.

Both parties appealed. Ace sought to have the jury's full verdict reinstated. Aetna sought to overturn its liability for the underlying tort or at least to secure a new trial because of various disputed trial rulings. On March 12, 1998, a panel

of the Ninth Circuit reversed the grant of judgment as a matter of law to Aetna on punitive damages, repeatedly asserting — incorrectly — that the evidence in Ace's favor was "undisputed" at trial, and that the district court had simply "ignored" it. App. 36a.

The court also vacated the trial judge's order conditionally granting a new trial on punitive damages. App. 39a. Stating that the district court had not made sufficiently explicit findings to support the order, the majority speculated that "it is a fair inference that it granted a new trial for the same reasons for which it granted [Aetna's motion for] judgment as a matter of law," and thus assumed "that the new trial was granted on the erroneous ground that the evidence was insufficient as a matter of law." *Id.* at 38a.

In asserting those conclusions, the court did not consider the various other "grounds" that Aetna had advanced in seeking a new trial, the "grounds" with which the trial judge had stated his "general" agreement. See page 9, *supra*. Nor did the court remand the matter to the trial judge to provide an opportunity to resolve any uncertainty about the judge's grounds for awarding a new trial on punitive damages.

The court of appeals simply nodded in the direction of the appropriate standard of review but stated:

> "While our review of an order granting a new trial is for abuse of discretion, 'a stringent standard applies when the motion is based on insufficiency of the evidence.' * * * A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict 'is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result.'" App. 38a-39a (citations omitted).

Applying this "stringent standard," the court concluded that "the record would not support" a finding that the verdict was "against the great weight of the evidence." *Ibid.*

The majority did conclude, however, that the punitive award of $16.5 million was excessive and that any lawful award of punitive damages in this case could not exceed three-times the actual damages. App. 40a-41a. The court thus ordered a remittitur from $16.5 million to $381,000. Judge Fletcher dissented from fixing that sum and would have remanded the matter for the trial judge to address any remittitur in the first instance. *Id.* at 45a-48a.

In response to petitions for rehearing filed by both parties, the court issued an order amending its opinion. App. 22a-24a. The only substantive change in the amended opinion of the court was the deletion of the amount to which the punitive judgment was to be remitted. *Ibid.* Instead, the court simply remanded the case to the district court with instructions to "den[y] Aetna's motion for a new trial on punitive damages on condition that Ace accepts a remittitur of punitive damages in an amount to be determined by the district court." *Ibid.* With this change, Judge Fletcher withdrew her dissent.

REASONS FOR GRANTING THE PETITION

This case raises substantial issues of nationwide significance concerning the scope of the power of federal trial judges to set aside jury verdicts as well as the appropriate role of the courts of appeals in reviewing the exercise of discretion to grant a new trial. The Ninth Circuit's "stringent standard" is particularly unsuitable in cases setting aside awards of punitive damages and allowing a new trial. As this Court has held, in evaluating punitive damage verdicts, careful judicial control is a traditional and important safeguard to ensure fairness in punishments and has a constitutional dimension. See *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994).

The district court in this case properly performed the constitutionally required scrutiny of the punitive damage verdict, finding that the weight of the evidence did not rise to the level of "clear and convincing" proof of "outrageous" conduct that Alaska requires before a jury may award any punitive damages.[2] The trial judge then exercised what this Court has called his "large" discretionary authority, see *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 432-433 (1996), to grant a new trial on Ace's punitive damages claim because of the weakness of the evidence and various other flaws in the determination of both Aetna's liability for punitive damages and the amount of the punishment.

In reversing the district court's new-trial ruling on punitive damages, the Ninth Circuit committed three significant errors, each of which merits plenary review by this Court.

First, it applied its "stringent standard" to constrain the traditional power of federal trial judges to grant new trials based on their view of the weakness of the evidence, limiting the trial judge's discretion to award new trials to cases in which the jury's verdict is against the "*great*" weight of the evidence. App. 14a. Application of this standard, however, conflicts with longstanding decisions of this Court and exacerbates a circuit conflict on this issue, which has become more acute in the wake of this Court's decision in *Gasperini* reaffirming the broad discretion vested in district judges to grant new-trial motions.

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[2] The Alaska Supreme Court long has "held that punitive damages are a harsh remedy 'not favored in law. They are to be allowed only with caution and within narrow limits.'" *Chizmar* v. *Mackie*, 896 P.2d 196, 210 (Alaska 1995). Under the governing Alaska statute, AS § 09.17.020, and case law, punitive damages are not available in tort cases unless the tortfeasor's conduct was "outrageous, [such as] acts done with malice or bad motives or * * * reckless indifference to the interests of another person."

At common law and under general federal practice, the power of the trial court to grant a new trial in what the judge believes is the interest of justice is one of the most significant protections against misguided verdicts. A special "stringent" standard for exercising that power, coupled with intrusive second-guessing of its exercise, has the inevitable effect of leaving in force verdicts that experienced, front-line trial judges consider unfair and unwarranted.

Leaving this conflict in place would undermine one of the central purposes of the Federal Rules of Civil Procedure, which is to establish uniform standards for federal civil litigation throughout the Nation. There is no legitimate reason why federal trial judges in some circuits should have less power to protect litigants against problematic verdicts than their colleagues in other circuits possess and exercise.

Second, the court of appeals failed to appreciate the constitutional significance of the district court's review of the punitive damage verdict. Because of the risk of arbitrary deprivation of property, the Due Process Clause compels trial courts to scrutinize any punitive verdict. And where, as here, a trial judge has reviewed such a verdict and concluded that it is not supported by the weight of the evidence, that conclusion is entitled to the greatest possible deference on appeal.

Third, the court of appeals erred in speculating about the reasons for the district court's grant of a "conditional" new trial under Fed. R. Civ. P. 50(c)(1) and basing its decision to reverse the district court on that speculation. To the extent there was any doubt about the district court's reasons for granting Aetna's motion and ordering a new trial on the entire punitive claim, the sound and accepted practice among the courts of appeals is to remand for clarification of those reasons, not to reverse on the basis of speculation and to order the judge to reinstate the problematic verdict. The

Ninth Circuit's failure to remand in this case thus creates a circuit conflict on this issue as well.

I. THE NINTH CIRCUIT'S ERRONEOUS STANDARDS FOR GRANTING AND REVIEWING NEW TRIAL ORDERS BASED ON THE SUFFICIENCY OF THE EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS.

Under this Court's precedents, the "authority to grant a new trial * * * is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). The trial court's authority has a long history at common law, see 1 W.S. Holdsworth, A HISTORY OF ENGLISH LAW 321, 346 (7th ed. 1956), and is premised on the court's broad "power and duty to order a new trial whenever, in its judgment, this action is required in order to prevent injustice." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2805 (1995) (citing cases).

In *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940), this Court held that a "motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving." See also *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 540 (1958) ("[t]he trial judge in the federal system has powers * * * to comment on the weight of the evidence and credibility of witnesses, *and discretion to grant a new trial if the verdict appears to be against the weight of the evidence*") (emphasis added).

A. It is questionable whether conditional new-trial orders based on the "weight" of the evidence are reviewable

at all. This Court's emphasis on the trial judges' discretion in *Montgomery Ward* indicated that the conditional award of a new trial is not reviewable in cases like this one:

> "Should the trial judge enter judgment n.o.v. and, in the alternative, grant a new-trial on any of the grounds assigned therefor, his disposition of the motion for a new trial *would not ordinarily be reviewable*, and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on remand, *would be governed by the trial judge's award of a new-trial.*" 311 U.S. 254 (emphases added).

This analysis, which this Court has never questioned, let alone overruled, has been interpreted by some courts to mean that the exercise of discretion to order a new trial because of the weakness of the evidence is not reviewable at all. Thus, until recently, a "line of cases" in the Second Circuit held that "a 'trial court order granting or denying a motion for a new trial on grounds that a verdict is against the weight of the evidence is not reviewable on appeal.'" *Binder* v. *Long Island Lighting Co.*, 57 F.3d 193, 201 (2d Cir. 1995) (citations omitted). See also *Lind* v. *Schenley Indus., Inc.*, 278 F.2d 79, 88 (3d Cir.), cert. denied, 364 U.S. 835 (1960) (some courts have "stated that a motion for a new trial on th[e] ground [that the verdict is against the weight of the evidence] ordinarily is nonreviewable because within the discretion of the trial court," citing *Montgomery Ward*). The Second Circuit, however, has now rejected those authorities and "adopt[ed] the view held by most circuits" asserting power to review such decisions. *Binder*, 57 F.3d. at 202.

B. In any event, the Ninth Circuit's standards for issuing and reviewing such orders — which it applied with vigor in this case — conflict directly and irreconcilably with the standards repeatedly articulated by this Court. And at

least one circuit has squarely repudiated the Ninth Circuit's "stringent" standards.

The Ninth Circuit held that "'a *stringent standard* applies when the motion is based on insufficiency of the evidence'" and that a trial court "may order a new trial based on insufficient evidence only if it finds that the jury's verdict 'is against the *great* weight of the evidence, or it is quite clear that the jury has reached a *seriously* erroneous result.'" App. 14a (emphases added) (quoting *EEOC* v. *Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997)). Several other circuits also apply this more rigorous and more skeptical standard when reviewing new trial orders based on the weight of the evidence. See, *e.g.*, *Sheridan* v. *E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1076 (3d Cir. 1995) (en banc) (a "stringent standard is necessary to ensure that a district court does not substitute its judgment of the facts and credibility of the witnesses for that of the jury"), cert. denied, 117 S. Ct. 2532 (1997); *Carter* v. *Fenner*, 136 F.3d 1000, 1010 (5th Cir. 1998) (applying stringent standard in order to protect jury verdict); *Carter* v. *DecisionOne Corp.*, 122 F.3d 997, 1004 (11th Cir. 1997) (motion for new trial "may only be granted when the jury's verdict is against the great weight of the evidence").

These courts offer a single rationale for constraining the trial judge's power and applying heightened scrutiny to new trial orders based on the trial judge's evaluation of the weight of the evidence. They argue that the Seventh Amendment precludes a trial judge from exercising the full measure of discretion otherwise accorded him by law. Specifically, these courts express concern that, without a "closer degree of scrutiny and supervision," a trial judge will merely substitute his decision for that of the jury's in derogation of the Seventh Amendment. See *Lind* v. *Schenley Indus., Inc.*, 278 F.2d at 90 ("close scrutiny is required in order to protect the litigant's right to a jury trial"); *Spurlin* v. *General Motors Corp.*, 528 F.2d 612, 619-620 (5th Cir. 1976) (noting

"several jurisdictions" apply a "more exacting" standard to motions seeking new trials on evidentiary grounds because such motions must be viewed "against the background of the Seventh Amendment").

In *Gasperini*, however, this Court flatly rejected this rationale for constraining effective post-verdict review by the trial court, holding that the court may, without offending the Seventh Amendment, exercise the full measure of its discretion to grant a new trial based on its evaluation of the weight of the evidence:

> "The reexamination clause does not inhibit the authority of trial judges to grant new trials 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.'" 518 U.S. at 432 (quoting Rule 59(a)).

This authority, the Court held, is "large:"

> "The trial judge in the federal system, has discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." *Ibid.* (citing *Byrd* v. *Blue Ridge Rural Electric Cooperative*, *supra*).

Indeed, the exercise of the district court's broad discretion to set aside a jury's verdict and grant a new trial "is not a derogation of the right of a trial by jury but is one of the historic safeguards of that right." 518 U.S. at 433.

The decision in *Gasperini* has since been applied in numerous cases to support a trial judge's broad discretion to grant new-trial motions in cases precisely like this one. In the Term just concluded, for example, this Court applied *Gasperini* in reaffirming the substantial deference an appellate court must accord to a district judge's decision to order a new trial unconditionally *or* to offer a remittitur in lieu of a new trial: "the trial judge's discretion includes 'overturning

verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur).'" *Hetzel* v. *Prince William County*, ___ U.S. ___, ___, 118 S. Ct. 1210, 1212 (1998) (*per curiam*).

Moreover, following *Gasperini*, some courts — but not all circuits — have reevaluated their more stringent standards for reviewing new-trial orders based on the weight of the evidence.

For example, in the wake of *Gasperini* the Seventh Circuit recently overruled its prior "exacting" standard for such orders. In *Medcom Holding Co.* v. *Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1397 (7th Cir. 1996), the court stated: "At one time we applied [the review] standard * * * more exacting[ly] when the district court granted a new trial because of the Seventh Amendment." The court held, however, that "in light of the Supreme Court's decision in *Gasperini* that an abuse of discretion standard of review does not violate the Seventh Amendment * * * we hereby abandon this practice as unnecessary" and recognized that the "trial judge in the federal system has discretion to grant a new trial if the verdict appears against the weight of the evidence." *Ibid.*

The Second Circuit now also appears to recognize the appropriate scope of the trial judge discretion, stating in *Santa Maria* v. *Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2d Cir. 1996) (quoting *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. at 251), that a "new trial must be granted if the court determines that the verdict is against the weight of the evidence." More recently, the Second Circuit quoted *Gasperini* in declaring that "the trial judge has 'discretion to grant a new trial if the evidence appears to [the judge] to be against the weight of the evidence." *Kirsch* v. *Fleet Street, Ltd.*, Nos. 96-9631, 97-7021, 1998 U.S. App. LEXIS 13516 at *34 (June 25, 1998).

The First Circuit has also recently invoked *Gasperini* for the proposition that the "trial judge has 'discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence.'" *Kelley* v. *Airborne Freight Corp.*, 140 F.3d 335, 355 (1998). This is a departure from prior First Circuit practice. See *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 558 (1989) (applying a "strict standard of review"). However, another panel of the same court even more recently stated that a "strict standard of review" applies to new-trial orders based on the weight of the evidence. *Collazo-Santiago* v. *Toyota Motor Corp.*, No. 97-1365, 1998 U.S. App. LEXIS 15330, at *16 n.6 (July 9, 1998). This apparent intra-circuit conflict underscores the confusion in the lower courts over the appropriate standard for awarding new trials and for reviewing new-trial orders and the need for definitive resolution of the issue.

C. Despite paying lip-service to the "abuse of discretion" standard of appellate review, the Ninth Circuit made plain that it enforces the heavy burden that it imposes on trial judges by subjecting their new-trial decisions to virtual *de novo* review in reevaluating the nature and thrust of the evidence.

The traditional, deferential abuse-of-discretion standard, however, is especially appropriate in reviewing evidence-based decisions ordering new trials. The trial judge enjoys the "unique opportunity to consider the evidence in the living courtroom," and that special perspective "must be respected." *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), cert. denied, 396 U.S. 835 (1969); see also FEDERAL PRACTICE AND PROCEDURE, *supra*, at § 2819 ("the appellate court must defer to the better opportunity the trial judge has to appraise the situation") (citing cases).

As Judge Henry J. Friendly wrote in *Indiscretion About Discretion*, 31 EMORY L. J. 747, 784 (1982), a trial "court's superior opportunities of observation * * * require greater

deference than would be accorded to its formulations of law or its application of law to the facts."

Thus, on appellate review of an order granting a new trial, a court of appeals should "defer to the district court because of its unique position to view the evidence and the course of the trial." *Miksis* v. *Howard*, 106 F.3d 754, 757 (7th Cir. 1997); cf. *Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 404 (1990) ("[d]eference to the determination of [the] courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court").

Abuse-of-discretion review, of course, is not a mere rubber stamp for any decision reached by the trial court. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell*, 496 U.S. at 405. But the court of appeals may not simply substitute its judgment for that of the district court. See *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) ("[t]he question * * * is not whether this Court, or whether the Court of Appeals, would as an original matter" have taken the same action; "it is whether the District Court abused its discretion") (citation omitted); see also *Calderon* v. *Thompson*, ___ U.S. ___, ___, 118 S. Ct. 1489, 1506-1507 (1998) (Souter, J., dissenting) ("a high degree of deference to the court exercising discretionary authority is the hallmark of such review"; "abuse of discretion" standard compels deference to any "reasonable" conclusion by trial judge).

Where the district court makes a reasoned decision about the quantity and quality of the evidence supporting a verdict and decides that a new trial is appropriate, the court of

appeals should defer to the trial judge's assessment of the evidence, even if the court of appeals believes that it would have reached a different conclusion had it sat at the trial. The Seventh Circuit struck the right balance recently in applying *Gasperini* to sustain a new-trial order, "[b]ecause the very nature of the problem counsels restraint . . . [and w]e must give the benefit of every doubt to the judgment of the trial judge." *McClain* v. *Owens-Corning Fiberglass Corp.*, 139 F.3d 1124, 1127 (1998).

The Ninth Circuit's "stringent" standard of review hardly accords the required "considerable deference," when the trial judge has weighed the evidence, assessed the credibility of witnesses, and decided that the jury's verdict is against the fair weight of the evidence. Rather, the Ninth Circuit's "stringent" standard of review, as applied in this case, licenses the appellate court to substitute its judgment for the trial court's — despite "the better opportunity the trial judge has to appraise the situation." FEDERAL PRACTICE AND PROCEDURE, *supra*, at § 2819.

The court of appeals clearly erred, therefore, in applying a "stringent standard" in the guise of abuse-of-discretion review. See *General Electric Co.* v. *Joiner*, ___ U.S. ___, ___, 118 S. Ct. 512, 517 (1997) ("[i]n applying an overly 'stringent' review * * * [the court of appeals] failed to give the trial court the deference that is the hallmark of abuse of discretion review").

In addition, even the Ninth Circuit panel agreed that the amount of damages awarded here was grossly excessive. Nevertheless, the appellate court overturned the grant of a new trial and simply remanded for remittitur. This course, too, exceeded the appellate court's proper function. As this Court held just last Term in *Hetzel*, ___ U.S. at ___, 118 S. Ct. at 1212, it is properly within *the trial judge's* discretion to fashion an appropriate remedy for dealing with an excessive verdict by granting a new trial "without qualification"

rather than opting for the alternative the court of appeals selected, offering the plaintiff a remittitur in lieu of a new trial.

D. The Ninth Circuit's erroneous standards have very serious practical ramifications. They prevent trial judges from granting relief, even when the judges conclude that verdicts are not in line with the fair thrust of the evidence. As applied, the "stringent" standard also allows an appellate court to substitute its judgment for the trial judge's more informed evaluation of the "weight" of the evidence.

By applying its erroneous standard, the Ninth Circuit ignored the district court's "unique position to view the evidence." The court of appeals simply accepted at face value each of Ace's theories about how Aetna had failed to process her claim properly. On several occasions, the court of appeals styled the evidence as "undisputed." App. 3a-15a. This characterization is patently untrue, since — as the trial judge recognized — Aetna countered every one of plaintiff's theories with substantial countervailing evidence. *Id.* at 58a-62a. Indeed, the existence of a substantial dispute about the evidence properly led the trial judge to find that the weight of the evidence did not demonstrate that Ace had met the higher standard of proof that Alaska law demands for imposing punitive damages — "clear and convincing evidence" of "outrageous" conduct.

For example, the court of appeals asserted that punitive damages were permissible because of allegedly "undisputed" evidence showing, among other things, that Aetna based its denial of Ace's disability claim "on an illegal standard for benefit eligibility." App. 12a. This was one of Ace's central theories of punitive liability. In fact, however, as the trial judge appreciated and the court of appeals evidently did not, Aetna's witnesses testified that they denied the claim after applying a *concededly lawful* standard: they viewed the data as showing that Ace was capable of performing *her own job*.

SER 36-37; 43-44. Moreover, the contemporaneous documents confirmed that the company was actually applying a lawful standard.[3]

It is hardly surprising, therefore, that the trial judge expressly concluded that, rather than showing "undisputed" evidence establishing that Aetna had applied what the court of appeals called "an illegal standard for benefit eligibility" (App. 12a), the record contained such substantial evidence that Aetna had applied a *legitimate* standard that Ace's contentions to the contrary could not satisfy the "clear and convincing evidence" test. *Id.* at 58a-62a.

Another example of the Ninth Circuit's failure to defer to the trial judge's more informed assessment of the record concerns the content of the job that Aetna viewed Ace as capable of performing — "her own job." App. 5a, 60a. The court of appeals faulted Aetna for "determining the physical nature of Ace's occupation" by relying on her supervisor's "Physical Demands Analysis worksheet" while "ignor[ing]" the more complete job description that was attached, which purportedly showed that "Ace's position required her to engage in rigorous travel to remote communities." *Id.* at 5a.

This characterization, however, ignores what the trial judge saw and heard in the evidence. The court of appeals relied on Ace's original 1987 job description, which had described her job as involving travel to remote locations about 5% of the time. ER 111. Her supervisor testified, however, that the loan program on which she worked in the intervening

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[3] The Claim Department medical review form explicitly stated that the applicable test was whether the claimant was "Disabled any *Reasonable* Occ." (SER 2) (emphasis added). The actual determinations recorded the application of a lawful standard: "Claim denied — not T.D. any *reasonable* occ" (SER 4); "Not disabled *own* occ" (SER 3); and "Not disabled from any *reasonable* occupation" (SER 5) (emphases added).

years had narrowed considerably, and so had her tasks. SER 100-105. So, when he completed the *current* "Physical Demands" job description for her in February 1992 — just months before Ace claimed that her knee injury made her totally disabled to perform "any reasonable occupation," including her own — he reported that her job was "100%" inside her office, mainly sitting down. SER 1. Accordingly, the trial judge was amply justified in finding that Ace had failed to show by "clear and convincing evidence" that Aetna had acted "outrageously" in relying on accurate, contemporaneous information rather than on a stale and inaccurate form. App. 59a-62a.

This brief recital suggests why the Ninth Circuit was wrong in overturning the trial judge's decision to grant judgment as a matter of law to Aetna on the punitive damage claim. At most, however, the evidence on liability was "close" — as the trial judge characterized it (App. 58a) — and the decision to grant a "conditional" new trial was a particularly appropriate discretionary alternative. The Ninth Circuit was able to reject that determination only because it applied its excessively intrusive standard of review.

The erroneously "stringent" standards adopted by the Ninth Circuit, and by several other circuits, thus interfere with the power of the court most familiar with the actual evidence — the trial court — to exercise its better informed discretion to determine whether the jury's verdict is against the "weight" of the evidence.

II. DUE PROCESS REQUIRES SPECIAL DEFERENCE ON APPEAL TO ORDERS GRANTING NEW TRIALS ON PUNITIVE DAMAGE VERDICTS.

The new trial order here granted relief from a punitive damage award the trial judge viewed as unwarranted. Even greater deference should be paid to such orders, because the Due Process Clause itself requires "'meaningful and adequate review by the trial court'" of a punitive damage verdict. See

Honda Motor Co. v. *Oberg*, 512 U.S. 415, 420, 432 (1994) (due process requires careful, post-verdict judicial review because "[p]unitive damages pose an acute danger of arbitrary deprivation of property").

In every one of its decisions reviewing the validity of punitive verdicts, this Court has recognized the enormous threat that juries will impose this kind of punishment without legitimate foundation. The risk is especially grave where, as in this case, the target is an out-of-state corporation and the plaintiff explicitly urges the jury to "send a message" back to corporate headquarters in another part of the country. This is a reason why the trial judge's determination that the evidence does not properly warrant any "punishment" deserves the greatest respect.

Judicial control of defamation claims provides a pertinent parallel. In those cases, the Constitution imposes a special responsibility on the trial court "to review independently the evidence" and requires added deference on appeal to such a review. *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 686-687 (1989) (requiring heightened scrutiny of evidence supporting finding of "actual malice"); *Rattray* v. *City of National City*, 51 F.3d 793, 800 (9th Cir. 1994), cert. denied, 516 U.S. 820 (1995). So too in punitive damage cases, the trial court's duty "to review independently the evidence" should be entitled to special deference, when the trial judge concludes that a punitive award is unwarranted or excessive.

In *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), this Court unambiguously directed:

> "In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or

> remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard."

Thus, when the trial court decides that a punitive award is against the weight of the evidence, it is faithfully implementing a form of protection derived directly from the Due Process Clause. There is no legitimate basis for constraining that corrective power by insisting, as the Ninth Circuit does, that the trial judge must rubber stamp any punitive verdict unless it is against the "great" weight of the evidence.

In addition, when the trial court exercises its discretion to grant a new trial in a punitive damage case, the court of appeals properly performs only a "limited function" in reviewing the order. The court of appeals must accord "considerable deference" to the district court's decision. *Browning-Ferris*, 492 U.S. at 280.

Moreover, most of the important factual issues weighed and decided by the trial judge in the typical case involving punitive damages turn on credibility determinations. These cases most often hinge on questions of motive and intent, good faith or bad faith. In deciding whether to sustain the jury's verdict, the trial judge, not an appellate panel reviewing a cold record, is in the "unique" position to make those credibility assessments. *Taylor*, 409 F.2d at 148. In this case, it was the trial judge who had the unique opportunity to observe the demeanor of the key witnesses, such as Ace herself, her expert witness, and Aetna's claims analysts.

This Court should grant review in this case to require the maximum deference on appeal to a trial court's decision to order a new trial in a punitive damages case.

III. IF FINDINGS ARE INSUFFICIENT UNDER RULE 50(c)(1) TO EXPLAIN THE GRANT OF A NEW TRIAL, THE PROPER PROCEDURE IS TO REMAND FOR ADDITIONAL FINDINGS, NOT TO REVERSE OUTRIGHT.

As explained above (at page 9), in moving for a conditional new trial on punitive damages, Aetna argued for that relief not only because the verdict was against the "weight of the evidence," but also on *six other* grounds, not dependent on the strength or weakness of the evidence. Those grounds included such issues as errors in instructions, improper closing argument, and excessiveness of damages suggesting passion and prejudice. In granting Aetna's motion, the trial judge specified that "[i]n general the court agrees with the arguments advanced by the defendant * * *." App. 49a.

The court of appeals stated that this formulation "failed" to satisfy the requirement of Rule 50(c)(1) that a court ruling on a conditional new-trial motion "shall specify the grounds for granting * * * the motion," because the judge had not "explicitly" enumerated the grounds on which he based his ruling. App. 14a. The court then proceeded to "infer," despite the trial judge's statement, that the conditional new trial was granted solely because of the "erroneous" view that the evidence was legally insufficient. Having rejected the finding of insufficiency in setting aside the judgment for Aetna as a matter of law, the court of appeals went on to reverse the order granting a new trial, directing the trial judge to reinstate the verdict on punitive liability.

That approach suffers from four serious flaws that merit this Court's review, because they seriously distort the proper procedure for acting on new trial motions and reviewing those orders.

First, it is beyond question that the trial judge had expressly relied on at least several of the grounds for relief Aetna had advanced, not simply the objection to the weight

of the evidence. Thus, on its face, the trial judge's order foreclosed the interpretation the court of appeals placed on it, as turning exclusively on the trial judge's view of the legal "insufficiency" of the evidence.

Second, nothing in Rule 50(c)(1) describes the specificity with which the trial judge must note the "grounds" for conditionally "granting or denying the motion for the new trial." It is not at all uncommon for trial judges to recite that they are accepting the arguments of one side or the other in granting *or denying* a new-trial motion. Indeed, the principal Rule governing motions for new trials, Rule 59(a), contains no requirement whatsoever that the trial judge recite *anything* to explain the decision to grant the motion. Compare Rule 59(c) (trial court "shall specify the grounds" for awarding a new trial "on its own initiative" rather than in response to a motion).

Thus, unlike Rule 52(a) for example, which requires the court in a bench trial to "find the facts specially and state separately its conclusions of law thereon," the Rule applicable here does not prevent a district judge from using a short-hand description incorporating "the grounds" for his ruling on a new-trial motion. The Ninth Circuit's approach erects an artificial requirement not warranted by the text or purpose of Rule 50(c)(1).

Third, even when a Rule calls for the district court to make specific findings, other circuits have held that those findings are sufficient if they are adequate to "indicate the factual basis for the ultimate conclusion" and inform the reviewing court about the reasons for the district court's decision. *Books* v. *Chater*, 91 F.3d 972, 978 (7th Cir. 1996); *Reich* v. *Newspapers of New England, Inc.*, 44 F.3d 1060, 1079 (1st Cir. 1995); *South-Western Publishing Co.* v. *Simons*, 651 F.2d 653, 656 n.2 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). Here, the district judge explained that he agreed "in general" with the arguments expressly enumer-

ated in Aetna's moving papers. That recital sufficiently incorporated "the grounds" for his order.

Fourth, and most fundamentally, if there was any fair doubt about the grounds on which the district judge relied, the proper remedy was to remand with directions to specify those grounds in fuller detail. It is the established practice of the courts of appeals to remand for such clarification, not to assume a basis for the ruling and then reject it. See, *e.g.*, *TEC Engineering Corp.* v. *Budget Molders Supply, Inc.*, 82 F.3d 542 (1st Cir. 1996); *NAACP* v. *Town of East Haven*, 70 F.3d 219 (2d Cir. 1995); *Preferred RX, Inc.* v. *American Prescription Plan, Inc.*, 46 F.3d 535 (6th Cir. 1995); *Liddell* v. *Board of Educ.*, 20 F.3d 324 (8th Cir. 1994). The contrary decision of the Ninth Circuit in this case presents a clear conflict in the circuits on this issue.

Moreover, the Ninth Circuit could not properly review — much less reverse — the order granting a new trial unless the court addressed and evaluated the grounds that actually motivated the trial judge's exercise of discretion. If the appellate court was right that the trial judge had not adequately described his reasons for granting relief, the court could not perform its review function without ascertaining why the judge entered the order.

The failure of the court of appeals to elicit any necessary clarification before proceeding to reverse the order and to reinstate the verdict was a further consequence of its erroneous arrogation of the power to conduct virtual *de novo* review of the new trial application. This failure denied Aetna its due-process right to fair appellate consideration of the grounds on which the trial judge had relied in setting aside the award of punitive damages and allowing a new trial.

This Court should therefore grant review to resolve the conflict among the courts of appeals on the proper procedures to be followed in assessing a district court's compliance with the requirements of Rule 50(c)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 96-35813 AND 96-36020
D.C. No. CV-94-00018-JWS

SHERRIE ACE,
PLAINTIFF-APPELLANT-CROSS-APPELLEE,

v.

AETNA LIFE INSURANCE COMPANY,
DEFENDANT-APPELLEE-CROSS-APPELLANT.

Appeals from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
November 5, 1997 — Seattle, Washington

Filed March 12, 1998
Amended May 7, 1998

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER,* Senior District Judge.

COUNSEL

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Jeffrey Feldman and Susan Orlansky, Young & Feldman, Anchorage, Alaska; Richard H. Friedman, Jeffrey K. Rubin, Friedman, Rubin & White, Anchorage, Alaska, for plaintiff-appellant.

Philip Lacovara, New York, New York, for defendant-appellee.

OPINION

SCHWARZER, Senior District Judge:

Sherrie Ace ("Ace"), a resident of Alaska, sued Aetna Life Insurance Company ("Aetna") in Alaska state court alleging that Aetna acted in bad faith in denying her claim for long-term disability benefits. Aetna removed the case to federal court pursuant to 28 U.S.C. §§ 1332, 1441.

The jury ruled for Ace on her bad faith claim and awarded her $27,009 for the wrongful denial of disability benefits and $100,000 for emotional distress. It also awarded her $16.5 million in punitive damages. The court then granted Aetna's post-trial motion for judgment as a matter of law on punitive damages and for a conditional new trial,[1] but denied its motions for judgment and for a new trial on the bad faith claim. It entered judgment for Ace in the amount of $127,009. Both parties appeal from the adverse rulings on their motions. Aetna also asserts error in the instructions to the jury with respect to emotional distress damages.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part and remand.

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[1] At oral argument, Aetna's counsel advised that Aetna had also moved for remittitur of the punitive damage award but that the court had not ruled on its motion.

FACTS

A. Sherrie Ace's Accident

Ace was employed by the State of Alaska as a senior loan examiner. As a state employee, Ace participated in an Aetna group insurance plan, which provided both short-term and long-term disability benefits. She selected and paid monthly premiums for the maximum available health and disability coverage.

In December 1986, Ace broke her leg in a sledding accident, which completely shattered her knee. Despite multiple surgeries, the condition of Ace's knee deteriorated and she suffered chronic pain in her leg and in her lower back. On April 30, 1992, Ace's orthopedic surgeon, Dr. McEvoy, performed an osteotomy[2] on Ace's knee. Immediately prior to the osteotomy, Ace applied for and received short-term disability benefits from Aetna.

Dr. McEvoy released Ace on a "trial" basis for half-time, light duty work from August 1, anticipating that she would be able to return to full-time by mid-September.[3] Because her pain had worsened, Ace felt unready to return to work and expressed her concerns to Dr. McEvoy. He suggested that she find another doctor. Ace saw a specialist, Dr. Zorn, who informed her that the osteotomy had failed and that she would need a total knee replacement. That operation would have to wait, however, until April 1993 to permit her knee to heal.

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[2] In this procedure, a patient's bones are rebroken and recast in order to shift the patient's weight onto less-damaged parts of the knee.

[3] At trial, Dr. McEvoy stated that he referred to the release as "trial" because "[i]t alerts the insurer and the employer and the patient . . . that [returning to work] may not work."

B. Ace's Application for Long-Term Disability Benefits

Ace contacted Aetna and requested a long-term disability benefits application because her short-term disability benefits had expired early in September 1992. Aetna representatives advised her that although her policy required her to be "under the care of a physician," the physician need not be a specialist. Accordingly, Ace had Dr. Kiessling, her long-time family physician, complete Aetna's Attending Physician's Statement ("Statement"). On the form, he diagnosed Ace as suffering from "severe degenerative joint disease," stated that her condition had retrogressed, noted that she experienced "frequent swelling" and "constant pain," and rated her to be between 30-50% and 50-70% physically disabled.[4] Aetna received Ace's application, along with the Statement and Dr. McEvoy's July work release, on October 12, 1992.

On October 20, Aetna returned the Statement to Ace for signature by the physician and asked her to submit a physical capacities evaluation form, which had been prepared by a physical therapist in July.[5] Ace submitted these forms and queried Aetna several times about the status of her claim, indicating her urgent need.

C. Aetna's First Denial

On November 17, Aetna denied Ace's claim. In the denial letter, Stephen Elliott ("Elliott"), Aetna's account specialist, informed Ace that [i]n order to be eligible for Long-term Disability Benefits, you must be totally disabled to the extent that you are unable to work at any gainful

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[4] Aetna's form characterized 30-50% disabled as "Class III . . . capable of light work," and 50-70% disabled as "Class IV . . . capable of . . . sedentary activity."

[5] The form indicated that Ace could not work an eight-hour day but predicted that her condition would improve in four to six weeks.

occupation due to bodily injury or illness. He noted that according to the Statement — the most current medical evidence on file — Ace was capable of continuing her employment as a loan examiner because she could perform clerical, sedentary work. Therefore, he wrote, "we cannot consider you as being totally disabled from performing the duties of any gainful occupation as required by the policy," and denied her request for benefits.

Neither Elliott nor any other Aetna employee investigated Ace's claim other than to review the material sent by Ace. Elliott did have the material reviewed by Dr. John Galvin, an Aetna medical consultant, who reported that Ace had not established that she had a long-term disability. But Elliott did not contact Ace's medical care providers or obtain additional medical records, though Ace had signed a release. In determining the physical nature of Ace's occupation, Elliott relied entirely on Aetna's Physical Demands Analysis worksheet, ignored the more complete description that was attached,[6] and did not contact Ace or her supervisor to discuss her job's physical requirements.

The "unable to work at any gainful employment" phrase in Elliott's letter is drawn from Aetna's policy. In his deposition, Elliott testified he understood Aetna's policy to require Ace to be "totally disabled from any gainful employment" and "unable to do . . . any work," though he added that he would have denied her application even if he believed that Ace could only have worked half-time. Elliott's supervisor, Bryan Southall ("Southall"), testified, however, that he knew Aetna could not apply the "unable to work at any gainful employment" language literally, and that Aetna

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[6] Aetna's physical demands analysis work sheet described her position as 100% office-based. Ace's supervisor had attached a more complete description, explaining that Ace's position required her to engage in rigorous travel to remote communities.

did not apply it literally in Ace's case.[7] Both he and Elliott testified Aetna applied a "reasonableness" test in evaluating disability.[8] Aetna conceded at trial, however, that no one from Aetna ever told Ace that the policy was not being interpreted and applied literally.[9] Ace testified she had called Aetna several times, but no one would clarify the term "disabled" or suggest specific documents she should send. Based on what she had been told in the letter, she would have to be totally disabled to be eligible for benefits; she knew that her condition was not that bad but also that it did not permit her to perform her job.

D. Ace's Request for Reconsideration

Ace responded to Aetna's denial by writing a short letter requesting reconsideration.[10] She enclosed a longer letter from Dr. Kiessling, dated November 30, explaining why Ace should be considered totally disabled. Dr. Kiessling's letter

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[7] Both parties agree that insurers cannot lawfully apply this standard literally. *See Aetna Life Ins. Co.* v. *Orr*, 205 Ark. 566, 169 S.W.2d 651, 654 (1943); *Erreca* v. *Western States Life Ins. Co.*, 19 Cal.2d 388, 121 P.2d 689 (1942).

[8] Both Elliott and Southall testified they determined disability based on whether an applicant was capable of earning a monthly amount equal to her disability benefits. Ace's benefits equaled 70% of her salary; thus, under their reasonableness test, Ace should have received benefits if she was incapable of working at least 70% of the time at her current job.

[9] Aetna's practice was to quote only the language of the policy and not to inform claimants of the legal requirements governing interpretation of the policy or of informal reasonableness guidelines used in evaluating applications.

[10] Elliott's November 17 letter had informed Ace that she could appeal his denial but did not specify particular documents or information to send that would be helpful.

noted that Ace's condition had worsened since his earlier Statement, that she now needed "nearly continuous[ ] traction" to obtain any pain relief, that she had received epidural injections for her back pain, that she could not sit for prolonged periods of time, and that she was unable to perform clerical work. He reclassified her as a "Class V disability," which Aetna's form describes as "severe functional capacity; incapable of minimal (sedentary) activity."

E. Aetna's Response to the Request for Reconsideration

On December 11, Elliott responded to Ace's request. His letter stated that the information submitted by Ace had been reviewed by Aetna's medical consultant who had advised that "there is no objective medical evidence . . . to support your contention that you are unable to work at any gainful occupation." It reiterated that to receive benefits "you must be totally disabled . . . from working at any gainful occupation." The letter advised Ace that for Aetna to review her file, Ace would have to have her physicians "furnish . . . objective medical evidence to support [her] contention [of total disability]." Aetna's policy neither contains nor defines the term "objective medical evidence," and it did not inform Ace what would qualify as objective medical evidence; its claim handling guidelines, moreover, instruct analysts to consider subjective complaints of pain even in the absence of objective medical findings.[11]

Southall testified that he was uncertain whether Ace's documents contained objective medical evidence and that he would not be surprised if a claimant did not know whether a

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[11] Aetna's Proper Claim Handling Guidelines instruct claim analysts to "[c]onsider subjective complaints of the claimant as well as objective evidence" and give as an example "[a] disability claimant [who] genuinely appears to be in pain, although there are no objective medical findings."

physician's letter constituted objective or subjective evidence. He stated that what he wanted to see was Dr. Kiessling's chart notes, reports of examinations, and x-rays, but he never asked Ace or Dr. Kiessling to supply these materials.

Aetna's medical consultant, Dr. Galvin, again reviewed Ace's file and concluded there was no medical evidence to support Dr. Kiessling's opinion that Ace was in the Class V disability category. At trial, however, he conceded that Dr. Kiessling's letter contained objective medical evidence and that he was unable to ascertain from Ace's file whether she was disabled.

F. Ace's Response to Aetna's Second Response

Although Aetna's December 11 letter did not state that the claim had again been denied, it was the functional equivalent of a denial. When Ace received this letter, she had been without income since her short-term disability benefits expired in September and had begun to sell her personal property. She consulted a lawyer, Francine Harbour ("Harbour"), who wrote to Aetna on Ace's behalf "to facilitate the review process in this matter." Harbour's letter stated that Ace believed she already had furnished objective medical evidence but would submit additional information to "clarify any misunderstanding." To that end she requested that Aetna send to her "the pertinent claim adjustment guidelines that [Aetna] relied on in reaching [the] denial determination" and certain other material. She asked Aetna to provide the documents prior to her sending additional information, so that she could ensure that her submission was complete.

Southall responded to Harbour's request on January 28, 1993, stating, "There are no claim adjustment guidelines which we follow." During discovery, however, Aetna produced its "Proper Claim Handling Guidelines" contained

in its Methods and Procedures Manual,[12] and at trial Aetna's director of disability claims testified that the guidelines are mandatory for its claim analysts to follow.

G. Ace's Renewed Request for Reconsideration

On February 12, 1993, Harbour submitted an additional packet of materials to Aetna enclosing another Attending Physician Statement prepared by Dr. Kiessling on January 7, 1993, which rated Ace as a Class V disability, a letter by Dr. Kiessling summarizing the objective medical evidence upon which he based his opinion and explaining why Dr. McEvoy's July release should not carry dispositive weight,[13] and a physical capacities evaluation ("PCE") completed January 28, 1993. The PCE stated that Ace was capable of sitting, standing or walking for less than an hour each during the day.

Harbour's cover letter explained Ace's fragile physical, emotional and economic position and advised Aetna that unless it accepted Ace's application by March 1, Ace would file suit. By February 1993, Ace had been forced to sell much of her personal property and her home. She sent her eldest son to live with another family and she lived in her car from late February through early April.

H. Aetna's Response

Southall called Harbour on February 24, 1993, and left a phone message the content of which was disputed at trial. It may have confirmed that the denial of the claim stood or it may have been a request for an independent medical

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[12] *See* note 11, *supra*.

[13] In his letter, Dr. Kiessling stated that, "Dr. McEvoy's release ignored the slower than anticipated healing and associated pain of the osteotomy procedure . . . as well as the critically complicating feature of her low back pain."

examination ("IME"). In any event, after receiving the additional materials, Dr. Galvin and Southall had concluded that there was insufficient information to support a finding that Ace was disabled. Dr. Galvin considered Dr. Kiessling's letter as being of "no value" because of its tone, and asserted that he "[did] not accept Dr. K's opinion, he is not a specialist and we are not providing a social benefit service." Southall testified that he discounted Dr. Kiessling's letter because it was unaccompanied by Dr. Kiessling's chart notes, examination results or other materials. Neither Southall nor Dr. Galvin contacted Dr. Kiessling to discuss his letter or to ask him to submit materials to support his conclusions.

I. Aetna's Demand for an Independent Medical Examination

On March 4 Aetna wrote Ace a letter, directing her to appear before a designated physician for an IME on April 5, 1993. On advice of counsel, Ace refused to appear. On March 15, Aetna wrote to Harbour, reaffirming its decision to deny the claim on the basis of Ace's failure to produce proof of "[t]otal disability [which] is the inability to work at any gainful occupation due to sickness or injury." Ace then retained litigation counsel who attempted, unsuccessfully, to reschedule the IME.

J. End of Ace's Disability

On April 8, 1993, Ace's previously-scheduled knee surgery was performed. Dr. Zorn successfully replaced Ace's knee. Within two months, Ace was walking without crutches and returned to work. Her disability ended June 1, 1993.

DISCUSSION

1. Judgment as a Matter of Law—Punitive Damages

Judgment as a matter of law is appropriate only when the evidence, "viewed in the light most favorable to the nonmoving party," could not reasonably support the verdict.

Amarel v. *Connell*, 102 F.3d 1494, 1517-18 (9th Cir.1997), (as amended). We review the grant of a motion for judgment as a matter of law *de novo*. *Id.* at 1517.

To support punitive damages under Alaska law, a plaintiff must prove by clear and convincing evidence that the wrongdoer's conduct "was outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another person." Alaska Stat. § 09.17.020;[14] *State Farm Fire & Cas. Co.* v. *Nicholson*, 777 P.2d 1152, 1158 (Alaska 1989) (quoting *Sturm, Ruger & Co.* v. *Day*, 594 P.2d 38, 46 (Alaska 1979), *modified on reh'g*, 615 P.2d 621 (Alaska 1980), *overruled on other grounds by Dura Corp.* v. *Harned*, 703 P.2d 396 (Alaska 1985)). Alaska courts will overturn a punitive damage award only if consideration of the record as a whole leaves them with a firm conviction of error and the need to intervene to prevent a miscarriage of justice. *Alaskan Village, Inc.* v. *Smalley*, 720 P.2d 945, 948 (Alaska 1986).

The district court concluded that no reasonable jury could find by clear and convincing evidence that Aetna acted with malice, bad motives or reckless indifference. After determining that the evidence did not support a finding of malice or bad motive, the court held that the evidence did not clearly and convincingly support a finding of reckless disregard, stating: A jury could find that by requiring the insured to marshall [sic] all the information, especially after Dr. Kiessling's second opinion was communicated, it is more likely than not that Aetna acted with enough disregard for Ace's interest to represent bad faith sufficient to breach the contract . . . but the evidence cannot support a finding that Aetna's disregard for Ace's interest was clearly and convincingly reckless to the point that Aetna should be punished. Plainly put, there is nothing outrageous about

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[14] The statute was amended in August 1997 to make minor textual changes not significant to the decision of this case.

relying on the opinion of the most knowledgeable physician, Dr. McEvoy, to the exclusion of what little contrary indication of Ace's condition had emerged prior to asking for an IME, the one procedure that could be expected to clear up any uncertainty.

In ruling that while Aetna acted "with enough disregard for Ace's interest to represent bad faith" but not "clearly and convincingly reckless[ly]," the district court ignored significant and undisputed evidence. Focusing only on Aetna's "requiring the insured to marshall all the information" and "relying on the opinion of the most knowledgeable physician," the court failed to take into account substantial evidence[15] from which a jury could reasonably have found, clearly and convincingly, that Aetna acted with reckless indifference to Ace's interests.[16] That evidence, which is summarized in the preceding part of this opinion and is undisputed, includes the following conduct by Aetna: (1) basing denial of the claim on an illegal standard for benefit eligibility;[17] (2) failing to inform the claimant of the standard actually used by Aetna in evaluating disability claims;[18] (3)

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[15] The court also failed to take into account that Aetna had effectively twice denied the application before it asked for the IME; had it wished to "clear up any uncertainty," it would presumably have asked for the examination before it decided whether to grant or deny the application.

[16] Because under Alaska law, the jury could award punitive damages on evidence that Aetna acted with reckless indifference to Ace's interests, it is not necessary to address the court's findings with respect to malice and bad motives.

[17] *See* note 7, *supra*.

[18] Alaska law requires the insurance company to provide a reasonable explanation of the basis in the policy for denial of a claim. Alaska Stat. §§ 21.36.125(1) and (14).

failing to investigate the claim and to seek or request the supporting information alleged to be missing; (4) failing to assist the claimant in presenting her disability claim;[19] (5) relying on outdated prognoses of the claimant's expected recovery and disregarding recent reports of her actual condition; (6) denying her claim based on an undefined "requirement" not a term of her policy and contrary to Aetna's internal claim adjustment guidelines; (7) falsely advising the claimant that Aetna had no claim adjustment guidelines; and (8) making a last-minute demand for an IME after having denied the claim.

In evaluating the sufficiency of the evidence, the district court failed to consider it as a whole and to resolve all inferences in favor of the jury's verdict. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S. Ct. 1404, 1410, 8 L.Ed.2d 777 (1962) ("In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."). Viewing the evidence in the light most favorable to the nonmoving party, we cannot say the evidence does not reasonably support an award of punitive damages.[20]

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[19] Alaska law requires an insurer upon receipt of notice of a claim, promptly to provide the necessary claim forms, instructions and assistance so that the claimant is able to comply with all reasonable requirements. Alaska Admin. Code tit. 3, § 26.040(a)(3) (1997).

[20] The two cases on which the district court relied, *State Farm Mut. Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), and *Nicholson*, 777 P.2d 1152, are inapposite. Both involved negotiations leading to disputes between the insured and the carrier over the amount to be paid on the insured's damage claim, the court holding that the evidence did not support a finding of "outrageous" conduct. Neither involved denial of coverage or benefits or other misconduct by the carrier.

2. Conditional Grant of New Trial — Punitive Damages

We have jurisdiction to review the conditional grant of a new trial order under Fed.R.Civ.P. 50(c)(1). *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 190 n. 15 (9th Cir.1989). The district court's order stated in relevant part:

> In general the court agrees with the arguments advanced by defendant and therefore grants the motion for a new trial as to the claim for punitive damages such that if the court of appeals should reverse this court's decision on the punitive damages claim there will be a new trial on that claim.

Rule 50(c)(1) states that the court "shall specify the grounds for granting the motion for the new trial." The court failed to do so here, at least explicitly, but it is a fair inference that it granted a new trial for the same reasons for which it granted judgment as a matter of law. The court's failure to rule on Aetna's request for a remittitur or to base its new trial order specifically on the magnitude of the punitive damage award, as opposed to the fact of the award, leads us to the conclusion that the new trial was granted on the erroneous ground that the evidence was insufficient as a matter of law. While our review of an order granting a new trial is for abuse of discretion, "a stringent standard applies when the motion is based on insufficiency of the evidence." *EEOC* v. *Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir.1997) (internal quotations omitted) (quoting *Venegas* v. *Wagner*, 831 F.2d 1514, 1519 (9th Cir.1987)). A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict "is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result." *Id.*; *Roy* v. *Volkswagen of Am., Inc.*, 896 F.2d 1174 (9th Cir.), *as amended by* 920 F.2d 618 (9th

Cir.1990). The court made no such finding and the record would not support it.

Rule 50(c)(1) further provides that where "the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered." The rule contemplates that in a case such as this, we may give direction for further proceedings. *See* 28 U.S.C. § 2106 ("any [ ] court of appellate jurisdiction may . . . remand the cause and direct the entry of such . . . order . . . as may be just under the circumstances").

While the evidence was sufficient as a matter of law to support an award of punitive damages, whether the award was excessive is a different issue.[21]

> A punitive damage award is excessive if it is manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law. Relevant factors include the compensatory damage amount, magnitude of the offense, importance of the policy violated and the defendant's wealth.

Alaskan Village, 720 P.2d at 949; *see also Sturm, Ruger & Co.*, 594 P.2d at 48; *Pluid* v. *B.K.*, 948 P.2d 981, 983 (Alaska 1997) (per curiam). No single factor is dispositive. *Sturm, Ruger & Co.*, 615 P.2d at 624 & n.3. The award must also pass muster under federal due process analysis. *BMW* v. *Gore*, 517 U.S. 559, 575-87, 116 S.Ct. 1589, 1599-1604, 134 L.Ed.2d 809 (1996) (identifying as "guideposts" that must be considered: (1) "degree of reprehensibility of the defendant's conduct"; (2) "ratio [of punitive damage award] to the actual harm inflicted on the plaintiff"; and (3) "[c]omparing the punitive damage award and the civil or

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[21] Aetna does not contend that the award was the product of passion or prejudice.

criminal penalties that could be imposed for comparable misconduct").

Our review of the reported Alaska decisions leads us to the conclusion that the punitive damage award was excessive. Although not dispositive itself, the ratio of punitive-to-compensatory damages — 130 to 1 — is far beyond any approved by Alaska courts.[22] Moreover, the amount of punitive damages far exceeds the potential civil and criminal penalties for Aetna's actions.[23] Accordingly, we remand with directions to the district court to enter an order denying a new trial on punitive damages conditioned on Ace accepting a remittitur of punitive damages in an amount to be determined by the district court.

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[22] *See Pluid*, 948 P.2d at 984, 986 (upholding jury's 5-to-1 ratio of punitive to compensatory damages); *Day*, 615 P.2d at 624 (remitting jury punitive damage award, resulting in a 3.6-to-1 ratio); *Alaska Ins. Co.* v. *Movin' On Constr. Inc.*, 718 P.2d 472, 475 (Alaska 1986) (upholding 3-to-1 ratio); *Teamsters Local 959* v. *Wells*, 749 P.2d 349, 361 n.26 (Alaska 1988) (upholding 2.54-to-1 ratio); *Ben Lomond, Inc.* v. *Campbell*, 691 P.2d 1042, 1048 (Alaska 1984) (upholding 2.38-to-1 ratio); *Alaskan Village*, 720 P.2d at 949 (upholding 2-to-1 ratio). *Cf. Cameron* v. *Beard*, 864 P.2d 538, 551 (Alaska 1994) (upholding 70-to-1 and 45-to-1 ratios). In *Cameron*, however, in addition to the $1,000 in compensatory damages received from each of the two individual defendants, the plaintiff also recovered $700,000 in actual damages from the State, another defendant. *Id.* at 544. Thus, the overall ratio of punitive to compensatory damages was 1-to-6.

[23] The maximum fine under the applicable provisions of the Alaska criminal code is $500,000. Alaska Stat. §§ 11.46.600(a)(2), 12.55.035(c)(1)(A).

3. Denial of Aetna's Motion for Judgment—Bad Faith Liability

The district court's denial of Aetna's motion may be reversed only if the evidence, construed in the light most favorable to Ace, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury's. *Acosta* v. *City & County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir.), *cert. denied sub nom.*, *Yawczak* v. *Acosta*, ___ U.S. ___, 117 S.Ct. 514, 136 L.Ed.2d 403 (1996). We review de novo the denial of a motion for judgment as a matter of law. *Id.*

To prove bad faith, a plaintiff must establish "the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Hillman* v. *Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1324 (Alaska 1993) (quoting *Anderson* v. *Continental Ins. Co.*, 85 Wis.2d 675, 271 N.W.2d 368, 376-77 (1978)). As the foregoing discussion shows, the court's denial of judgment as a matter of law is supported by the evidence that (1) Aetna did not investigate Ace's claim and shifted the burden of investigating entirely to her;[24] (2) Aetna did not gather any medical records, contact Ace's lawyers, or telephone Ace or her employer to obtain evidence relevant to her claim; (3) Aetna failed to disclose the standard it was obliged to use in evaluating a disability claim; (4) Aetna failed to provide a reasonable explanation for its denial of Ace's claim; (5) Aetna acted unreasonably in reviewing Ace's records by relying on outdated prognoses of her expected recovery and ignoring more recent reports on her actual condition; (6) Aetna failed

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[24] Aetna's claim handling guidelines instruct claims handlers to: "Obtain all available pertinent facts, not just those that are favorable to the company. Develop the claimant's case as well as the company's. If he is being treated by different doctors, obtain medical information from all of them."

to answer Ace's questions and to tell her what documents to submit in support of her claim; and (7) Aetna knew that Ace suffered from a chronic condition that had been predicted to deteriorate.

The foregoing discussion also disposes of Aetna's appeal from the denial of a new trial on its bad faith liability.

4. Denial of Aetna's Motion for New Trial on the Award of "Emotional Distress" Damages

Aetna appeals the denial of a new trial on the award of "emotional distress" damages, asserting that the district court erred by failing to instruct the jury that a plaintiff seeking emotional distress damages must prove that her distress was "severe" before any damages may be awarded. We review the denial of a new trial for abuse of discretion. *Wharf* v. *Burlington N. R.R. Co.*, 60 F.3d 631, 637 (9th Cir.1995). We hold that the district court did not abuse its discretion in denying Aetna's motion for a new trial.

Under Alaska law, breach of the implied covenant of good faith and fair dealing is actionable in tort against insurers. *Nicholson*, 777 P.2d 1152. Emotional distress is a category of damages in a bad faith case but is not an element of the claim. Alaska courts have never explicitly limited recovery of emotional distress damages in bad faith insurance cases to those instances where the plaintiff has shown "severe" emotional distress. However, *Aetna interprets Chizmar* v. *Mackie*, 896 P.2d 196 (Alaska 1995), a negligent infliction of emotional distress case, as requiring plaintiffs seeking emotional distress damages from any type of tort to prove that their distress was "severe" before any damages may be awarded.[25]

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[25] Aetna also relies on *Hillman*, 855 P.2d. at 1324. *Hillman* cites a Wisconsin case, *Anderson*, 271 N.W.2d at 376-77, which required severe emotional distress, but uses the case to explain the

Aetna's reliance on *Chizmar* is misplaced. The requirement that the damages be "severe" is an element of the underlying torts of negligent and intentional infliction of emotional distress, but not of the tort of breach of the duty of good faith and fair dealing by an insurer to an insured. *Chizmar*, 896 P.2d at 204 (negligent infliction); *Cameron* v. *Beard*, 864 P.2d 538, 548 (Alaska 1993) (intentional infliction). Aetna contends that the elements of the two torts, intentional infliction of emotional distress[26] and bad faith breach, are so similar that any attempt to distinguish them would be artificial. The argument overlooks the fact that Alaska courts have treated intentional infliction of emotional distress and bad faith breach cases differently. For instance, under Alaska law, a plaintiff cannot sustain a claim for intentional infliction of emotional distress unless the defendant's conduct rises to the level of outrageousness, which would warrant a punitive damage award. *Hawks* v. *Department of Pub. Safety*, 908 P.2d 1013, 1015 (Alaska 1995) (citing *Richardson* v. *Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985)). However, a plaintiff may successfully bring a bad faith breach claim and recover compensatory damages where the evidence was insufficient to support an award of punitive damages because it did not show

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objective and subjective elements of bad faith. The *Hillman* court did not address the severity of the emotional distress damages that must be proved or cite to the *Anderson* court's discussion of this issue. The fact that the court relied on one portion of the *Anderson* opinion does not support the claim that it also adopted other parts of the opinion.

[26] Under Alaska law, a claim for intentional infliction of emotional distress has three elements: (1) the defendant's conduct is extreme and outrageous; (2) the conduct is intentional or reckless; and (3) the conduct causes severe emotional distress. *Bishop* v. *Municipality of Anchorage*, 899 P.2d 149, 155 (Alaska 1995) (citing *King* v. *Brooks*, 788 P.2d 707, 711 (Alaska 1990)).

that the insurer's actions were outrageous or reckless. *Nicholson*, 777 P.2d at 1158; *Weiford*, 831 P.2d at 1267.

Moreover, the policy considerations for requiring severity to be shown do not support applying the requirement to bad faith insurance cases. As the court said in *Chizmar*, "The basic assumption underlying the traditional rule is that emotional distress without physical injury is relatively trivial and easily feigned." *Chizmar*, 896 P.2d at 201. In contrast, when an insurance company wrongly refuses to honor its obligations, emotional distress is a natural and believable response. Insureds bargained and paid for the security and peace of mind of knowing that reimbursement and financial support will be provided in the event that a misfortune occurs. As insurance payments often serve as a safety net for the insured, Aetna's refusal to cover Ace's injury is foreseeably egregious.

The fact that the Alaska courts have applied the tort of bad faith breach only to insurance contracts between the insurer and the insured further demonstrates that these policy considerations do not come into play. See *Nicholson*, 777 P.2d at 1157. By allowing insureds to bring the action in tort, Alaska courts have relieved plaintiffs of the obligation of bringing a separate tort claim for negligent or intentional infliction of emotional distress. However, unlike a plaintiff in an insurance case, a plaintiff bringing a claim for bad faith breach of an employment contract would have to independently establish the tort of negligent or intentional infliction of emotional distress to recover emotional distress damages. *See, e.g.*, *ARCO Alaska, Inc.* v. *Akers*, 753 P.2d 1150, 1153-54 (Alaska 1988) (no independent tort for breach of good faith and fair dealing in an employment contract).

CONCLUSION

We AFFIRM the denial of Aetna's motions for judgment as a matter of law on bad faith liability, for a new trial on bad faith liability and for a new trial on emotional distress

damages. We REVERSE the grant of judgment as a matter of law on punitive damages and we VACATE the conditional grant of a new trial on punitive damages. We REMAND with direction to enter an order denying Aetna's motion for new trial on punitive damages on condition that Ace accepts a remittitur of punitive damages in an amount to be determined by the district court.

Costs on appeal shall be awarded to Ace pursuant to Fed.R.App.P. 39(a).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-35813 AND 96-36020
D.C. No. CV-94-00018-JWS

SHERRIE ACE,
PLAINTIFF-APPELLANT-CROSS-APPELLEE,

v.

AETNA LIFE INSURANCE COMPANY,
DEFENDANT-APPELLEE-CROSS-APPELLANT.

Appeals from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
November 5, 1997 — Seattle, Washington
Filed May 7, 1998

ORDER AMENDING OPINION AND GRANTING PETITIONS FOR REHEARING IN PART

Before: Betty B. Fletcher and Diarmuid F. O'Scannlain, Circuit Judges, and William W. Schwarzer,* Senior District Judge.

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Jeffrey Feldman and Susan Orlansky, Young & Feldman, Anchorage, Alaska; Richard H. Friedman and Jeffrey K. Rubin, Friedman, Rubin & White, Anchorage, Alaska, for the plaintiff-appellant.

Philip Lacovara, New York, New York, for the defendant-appellee.

ORDER

The opinion filed on March 12, 1998, is hereby amended as follows:

1) by deleting all of the text contained in the paragraph beginning on slip opinion page 2267 at line 21 with the words "Our review . . ." and ending on page 2268, line 16, with ". . . a new trial)" and replacing it with the following:

> Our review of the reported Alaska decisions leads us to the conclusion that the punitive damage award was excessive. Although not dispositive itself, the ratio of punitive-to-compensatory damages — 130 to 1 — is far beyond any approved by Alaska courts.[1] Moreover, the amount of punitive damages

[1] *See Pluid*, 948 P.2d at 984, 986 (upholding jury's 5-to-1 ratio of punitive to compensatory damages); *Day*, 615 P.2d at 624 (remitting jury punitive damage award, resulting in a 3.6-to-1 ratio); *Alaska Ins. Co.* v. *Movin' On Constr. Inc.*, 718 P.2d 472, 475 (Alaska 1986) (upholding 3-to-1 ratio); *Teamsters Local 959* v. *Wells*, 749 P.2d 349, 361 n.26 (Alaska 1988) (upholding 2.54-to-1 ratio); *Ben Lomond, Inc.* v. *Cambell*, 691 P.2d 1042, 1048 (Alaska 1984) (upholding 2.38-to-1 ratio); *Alaskan Village*, 720 P.2d at 949

far exceeds the potential civil and criminal penalties for Aetna's actions.[2] Accordingly, we remand with directions to the district court to enter an order denying a new trial on punitive damages conditioned on Ace accepting a remittitur of punitive damages in an amount to be determined by the district court.

2) by deleting the last sentence of the opinion at slip opinion 2272 and replacing it with the following:

> We REMAND with direction to enter an order denying Aetna's motion for new trial on punitive damages on condition that Ace accepts a remittitur of punitive damages in an amount to be determined by the district court.

3) by deleting Judges Fletcher's dissent in its entirety.

4) by adding after the last sentence of the opinion:

> Costs on appeal shall be awarded to Ace pursuant to Fed. R. App. P. 39 (a).

In all other respects, the petitions are denied.

(upholding 2-to-1 ratio). *Cf. Cameron* v. *Beard*, 864 P.2d 538, 551 (Alaska 1994) (upholding 70-to-1 and 45-to-1 ratios). In *Cameron*, however, in addition to the $1,000 in compensatory damages received from each of the two individual defendants, the plaintiff also recovered $700,000 in actual damages from the State, another defendant. *Id.* at 544. Thus, the overall ratio of punitive to compensatory damages was 1-to-6.

[2] The maximum fine under the applicable provisions of the Alaska criminal code is $500,000. Alaska Stat. §§ 11.46.600(a)(2), 12.55.035(c)(1)(A).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-35813 AND 96-36020
D.C. No. CV-94-00018-JWS

SHERRIE ACE,
PLAINTIFF-APPELLANT-CROSS-APPELLEE,

v.

AETNA LIFE INSURANCE COMPANY,
DEFENDANT-APPELLEE-CROSS-APPELLANT.

Appeals from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
November 5, 1997 — Seattle, Washington

Filed March 12, 1998

Before: Betty B. Fletcher and Diarmuid F. O'Scannlain, Circuit Judges, and William W. Schwarzer,* Senior District Judge.

COUNSEL

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Jeffrey Feldman and Susan Orlansky, Young & Feldman, Anchorage, Alaska; Richard H. Friedman, Jeffrey K. Rubin, Friedman, Rubin & White, Anchorage, Alaska, for plaintiff-appellant.

Philip Lacovara, New York, New York, for defendant-appellee.

OPINION

SCHWARZER, Senior District Judge:

Sherrie Ace ("Ace"), a resident of Alaska, sued Aetna Life Insurance Company ("Aetna") in Alaska state court alleging that Aetna acted in bad faith in denying her claim for long-term disability benefits. Aetna removed the case to federal court pursuant to 28 U.S.C. §§ 1332, 1441.

The jury ruled for Ace on her bad faith claim and awarded her $27,009 for the wrongful denial of disability benefits and $100,000 for emotional distress. It also awarded her $16.5 million in punitive damages. The court then granted Aetna's post-trial motion for judgment as a matter of law on punitive damages and for a conditional new trial,[1] but denied its motions for judgment and for a new trial on the bad faith claim. It entered judgment for Ace in the amount of $127,009. Both parties appeal from the adverse rulings on their motions. Aetna also asserts error in the instructions to the jury with respect to emotional distress damages.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part and remand.

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[1] At oral argument, Aetna's counsel advised that Aetna had also moved for remittitur of the punitive damage award but that the court had not ruled on its motion.

FACTS

A. Sherrie Ace's Accident

Ace was employed by the State of Alaska as a senior loan examiner. As a state employee, Ace participated in an Aetna group insurance plan, which provided both short-term and long-term disability benefits. She selected and paid monthly premiums for the maximum available health and disability coverage.

In December 1986, Ace broke her leg in a sledding accident, which completely shattered her knee. Despite multiple surgeries, the condition of Ace's knee deteriorated and she suffered chronic pain in her leg and in her lower back. On April 30, 1992, Ace's orthopedic surgeon, Dr. McEvoy, performed an osteotomy[2] on Ace's knee. Immediately prior to the osteotomy, Ace applied for and received short-term disability benefits from Aetna.

Dr. McEvoy released Ace on a "trial" basis for half-time, light duty work from August 1, anticipating that she would be able to return to full-time by mid-September.[3] Because her pain had worsened, Ace felt unready to return to work and expressed her concerns to Dr. McEvoy. He suggested that she find another doctor. Ace saw a specialist, Dr. Zorn, who informed her that the osteotomy had failed and that she would need a total knee replacement. That operation would have to wait, however, until April 1993 to permit her knee to heal.

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[2] In this procedure, a patient's bones are rebroken and recast in order to shift the patient's weight onto less-damaged parts of the knee.

[3] At trial, Dr. McEvoy stated that he referred to the release as "trial" because "[i]t alerts the insurer and the employer and the patient . . . that [returning to work] may not work."

B. Ace's Application for Long-Term Disability Benefits

Ace contacted Aetna and requested a long-term disability benefits application because her short-term disability benefits had expired early in September 1992. Aetna representatives advised her that although her policy required her to be "under the care of a physician," the physician need not be a specialist. Accordingly, Ace had Dr. Kiessling, her long-time family physician, complete Aetna's Attending Physician's Statement ("Statement"). On the form, he diagnosed Ace as suffering from "severe degenerative joint disease," stated that her condition had retrogressed, noted that she experienced "frequent swelling" and "constant pain," and rated her to be between 30-50% and 50-70% physically disabled.[4] Aetna received Ace's application, along with the Statement and Dr. McEvoy's July work release, on October 12, 1992.

On October 20, Aetna returned the Statement to Ace for signature by the physician and asked her to submit a physical capacities evaluation form, which had been prepared by a physical therapist in July.[5] Ace submitted these forms and queried Aetna several times about the status of her claim, indicating her urgent need.

C. Aetna's First Denial

On November 17, Aetna denied Ace's claim. In the denial letter, Stephen Elliott ("Elliott"), Aetna's account specialist, informed Ace that

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[4] Aetna's form characterized 30-50% disabled as "Class III . . . capable of light work," and 50-70% disabled as "Class IV . . . capable of . . . sedentary activity."

[5] The form indicated that Ace could not work an eight-hour day but predicted that her condition would improve in four to six weeks.

> [i]n order to be eligible for Long-term Disability Benefits, you must be totally disabled to the extent that you are unable to work at any gainful occupation due to bodily injury or illness.

He noted that according to the Statement — the most current medical evidence on file — Ace was capable of continuing her employment as a loan examiner because she could perform clerical, sedentary work. Therefore, he wrote, "we cannot consider you as being totally disabled from performing the duties of any gainful occupation as required by the policy," and denied her request for benefits.

Neither Elliott nor any other Aetna employee investigated Ace's claim other than to review the material sent by Ace. Elliott did have the material reviewed by Dr. John Galvin, an Aetna medical consultant, who reported that Ace had not established that she had a long-term disability. But Elliott did not contact Ace's medical care providers or obtain additional medical records, though Ace had signed a release. In determining the physical nature of Ace's occupation, Elliott relied entirely on Aetna's Physical Demands Analysis worksheet, ignored the more complete description that was attached,[6] and did not contact Ace or her supervisor to discuss her job's physical requirements.

The "unable to work at any gainful employment" phrase in Elliott's letter is drawn from Aetna's policy. In his deposition, Elliott testified he understood Aetna's policy to require Ace to be "totally disabled from any gainful employment" and "unable to do . . . any work," though he added that he would have denied her application even if he believed that Ace could only have worked half-time. Elliott's

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[6] Aetna's physical demands analysis work sheet described her position as 100% office-based. Ace's supervisor had attached a more complete description, explaining that Ace's position required her to engage in rigorous travel to remote communities.

supervisor, Bryan Southall ("Southall"), testified, however, that he knew Aetna could not apply the "unable to work at any gainful employment" language literally, and that Aetna did not apply it literally in Ace's case.[7] Both he and Elliott testified Aetna applied a "reasonableness" test in evaluating disability.[8] Aetna conceded at trial, however, that no one from Aetna ever told Ace that the policy was not being interpreted and applied literally.[9] Ace testified she had called Aetna several times, but no one would clarify the term "disabled" or suggest specific documents she should send. Based on what she had been told in the letter, she would have to be totally disabled to be eligible for benefits; she knew that her condition was not that bad but also that it did not permit her to perform her job.

D. Ace's Request for Reconsideration

Ace responded to Aetna's denial by writing a short letter requesting reconsideration.[10] She enclosed a longer letter

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[7] Both parties agree that insurers cannot lawfully apply this standard literally. *See Aetna Life Ins. Co.* v. *Orr*, 169 S.W.2d 651, 654 (Ark. 1943); *Erreca* v. *Western States Life Ins. Co.*, 121 P.2d 689 (Cal. 1942).

[8] Both Elliott and Southall testified they determined disability based on whether an applicant was capable of earning a monthly amount equal to her disability benefits. Ace's benefits equaled 70% of her salary; thus, under their reasonableness test, Ace should have received benefits if she was incapable of working at least 70% of the time at her current job.

[9] Aetna's practice was to quote only the language of the policy and not to inform claimants of the legal requirements governing interpretation of the policy or of informal reasonableness guidelines used in evaluating applications.

[10] Elliott's November 17 letter had informed Ace that she could appeal his denial but, did not specify particular documents or

from Dr. Kiessling, dated November 30, explaining why Ace should be considered totally disabled. Dr. Kiessling's letter noted that Ace's condition had worsened since his earlier Statement, that she now needed "nearly continuous[ ] traction" to obtain any pain relief, that she had received epidural injections for her back pain, that she could not sit for prolonged periods of time, and that she was unable to perform clerical work. He reclassified her as a "Class V disability," which Aetna's form describes as "severe functional capacity; incapable of minimal (sedentary) activity."

E. Aetna's Response to the Request for Reconsideration

On December 11, Elliott responded to Ace's request. His letter stated that the information submitted by Ace had been reviewed by Aetna's medical consultant who had advised that "there is no objective medical evidence . . . to support your contention that you are unable to work at any gainful occupation." It reiterated that to receive benefits "you must be totally disabled . . . from working at any gainful occupation." The letter advised Ace that for Aetna to review her file, Ace would have to have her physicians "furnish . . . objective medical evidence to support [her] contention [of total disability]." Aetna's policy neither contains nor defines the term "objective medical evidence," and it did not inform Ace what would qualify as objective medical evidence; its claim handling guidelines, moreover, instruct analysts to consider subjective complaints of pain even in the absence of objective medical findings.[11]

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information to send that would be helpful.

[11] Aetna's Proper Claim Handling Guidelines instruct claim analysts to "[c]onsider subjective complaints of the claimant as well as objective evidence" and give as an example "[a] disability claimant [who] genuinely appears to be in pain, although there are no objective medical findings."

Southall testified that he was uncertain whether Ace's documents contained objective medical evidence and that he would not be surprised if a claimant did not know whether a physician's letter constituted objective or subjective evidence. He stated that what he wanted to see was Dr. Kiessling's chart notes, reports of examinations, and x-rays, but he never asked Ace or Dr. Kiessling to supply these materials.

Aetna's medical consultant, Dr. Galvin, again reviewed Ace's file and concluded there was no medical evidence to support Dr. Kiessling's opinion that Ace was in the Class V disability category. At trial, however, he conceded that Dr. Kiessling's letter contained objective medical evidence and that he was unable to ascertain from Ace's file whether she was disabled.

F. Ace's Response to Aetna's Second Response

Although Aetna's December 11 letter did not state that the claim had again been denied, it was the functional equivalent of a denial. When Ace received this letter, she had been without income since her short-term disability benefits expired in September and had begun to sell her personal property. She consulted a lawyer, Francine Harbour ("Harbour"), who wrote to Aetna on Ace's behalf "to facilitate the review process in this matter." Harbour's letter stated that Ace believed she already had furnished objective medical evidence but would submit additional information to "clarify any misunderstanding." To that end she requested that Aetna send to her "the pertinent claim adjustment guidelines that [Aetna] relied on in reaching [the] denial determination" and certain other material. She asked Aetna to provide the documents prior to her sending additional information, so that she could ensure that her submission was complete.

Southall responded to Harbour's request on January 28, 1993, stating, "There are no claim adjustment guidelines which we follow." During discovery, however, Aetna pro-

duced its "Proper Claim Handling Guidelines" contained in its Methods and Procedures Manual,[12] and at trial Aetna's director of disability claims testified that the guidelines are mandatory for its claim analysts to follow.

G. Ace's Renewed Request for Reconsideration

On February 12, 1993, Harbour submitted an additional packet of materials to Aetna enclosing another Attending Physician Statement prepared by Dr. Kiessling on January 7, 1993, which rated Ace as a Class V disability, a letter by Dr. Kiessling summarizing the objective medical evidence upon which he based his opinion and explaining why Dr. McEvoy's July release should not carry dispositive weight,[13] and a physical capacities evaluation ("PCE") completed January 28, 1993. The PCE stated that Ace was capable of sitting, standing or walking for less than an hour each during the day.

Harbour's cover letter explained Ace's fragile physical, emotional and economic position and advised Aetna that unless it accepted Ace's application by March 1, Ace would file suit. By February 1993, Ace had been forced to sell much of her personal property and her home. She sent her eldest son to live with another family and she lived in her car from late February through early April.

H. Aetna's Response

Southall called Harbour on February 24, 1993, and left a phone message the content of which was disputed at trial. It may have confirmed that the denial of the claim stood or it

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[12] See note 11, *supra*.

[13] In his letter, Dr. Kiessling stated that, "Dr. McEvoy's release ignored the slower than anticipated healing and associated pain of the osteotomy procedure . . . as well as the critically complicating feature of her low back pain."

may have been a request for an independent medical examination ("IME"). In any event, after receiving the additional materials, Dr. Galvin and Southall had concluded that there was insufficient information to support a finding that Ace was disabled. Dr. Galvin considered Dr. Kiessling's letter as being of "no value" because of its tone, and asserted that he "[did] not accept Dr. K's opinion, he is not a specialist and we are not providing a social benefit service." Southall testified that he discounted Dr. Kiessling's letter because it was unaccompanied by Dr. Kiessling's chart notes, examination results or other materials. Neither Southall nor Dr. Galvin contacted Dr. Kiessling to discuss his letter or to ask him to submit materials to support his conclusions.

I. Aetna's Demand for an Independent Medical Examination

On March 4 Aetna wrote Ace a letter, directing her to appear before a designated physician for an IME on April 5, 1993. On advice of counsel, Ace refused to appear. On March 15, Aetna wrote to Harbour, reaffirming its decision to deny the claim on the basis of Ace's failure to produce proof of "[t]otal disability [which] is the inability to work at any gainful occupation due to sickness or injury." Ace then retained litigation counsel who attempted, unsuccessfully, to reschedule the IME.

J. End of Ace's Disability

On April 8, 1993, Ace's previously-scheduled knee surgery was performed. Dr. Zorn successfully replaced Ace's knee. Within two months, Ace was walking without crutches and returned to work. Her disability ended June 1, 1993.

DISCUSSION

1. Judgment as a Matter of Law—Punitive Damages

Judgment as a matter of law is appropriate only when the evidence, "viewed in the light most favorable to the nonmov-

ing party," could not reasonably support the verdict. *Amarel* v. *Connell*, 102 F.3d 1494, 1517-18 (9th Cir. 1997), (as amended). We review the grant of a motion for judgment as a matter of law *de novo*. *Id.* at 1517.

To support punitive damages under Alaska law, a plaintiff must prove by clear and convincing evidence that the wrongdoer's conduct "was outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another person." Alaska Stat. § 09.17.020;[14] *State Farm Fire & Cas. Co.* v. *Nicholson*, 777 P.2d 1152, 1158 (Alaska 1989) (quoting *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *modified on reh'g*, 615 P.2d 621 (Alaska *1980), overruled on other grounds by Dura Corp.* v. *Harned*, 703 P.2d 396 (Alaska 1985)). Alaska courts will overturn a punitive damage award only if consideration of the record as a whole leaves them with a firm conviction of error and the need to intervene to prevent a miscarriage of justice. *Alaskan Village, Inc.* v. *Smalley*, 720 P.2d 945, 948 (Alaska 1986).

The district court concluded that no reasonable jury could find by clear and convincing evidence that Aetna acted with malice, bad motives or reckless indifference. After determining that the evidence did not support a finding of malice or bad motive, the court held that the evidence did not clearly and convincingly support a finding of reckless disregard, stating:

> A jury could find that by requiring the insured to marshall [sic] all the information, especially after Dr. Kiessling's second opinion was communicated, it is more likely than not that Aetna acted with enough disregard for Ace's interest to represent bad faith sufficient to breach the contract . . . but the evidence cannot support a finding that Aetna's disregard for Ace's interest was

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[14] The statute was amended in August 1997 to make minor textual changes not significant to the decision of this case.

> clearly and convincingly reckless to the point that Aetna should be punished. Plainly put, there is nothing outrageous about relying on the opinion of the most knowledgeable physician, Dr. McEvoy, to the exclusion of what little contrary indication of Ace's condition had emerged prior to asking for an IME, the one procedure that could be expected to clear up any uncertainty.

In ruling that while Aetna acted "with enough disregard for Ace's interest to represent bad faith" but not "clearly and convincingly reckless[ly]," the district court ignored significant and undisputed evidence. Focusing only on Aetna's "requiring the insured to marshall all the information" and "relying on the opinion of the most knowledgeable physician," the court failed to take into account substantial evidence[15] from which a jury could reasonably have found, clearly and convincingly, that Aetna acted with reckless indifference to Ace's interests.[16] That evidence, which is summarized in the preceding part of this opinion and is undisputed, includes the following conduct by Aetna: (1) basing denial of the claim on an illegal standard for benefit eligibility;[17] (2) failing to inform the claimant of the standard actually used by

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[15] The court also failed to take into account that Aetna had effectively twice denied the application before it asked for the IME; had it wished to "clear up any uncertainty," it would presumably have asked for the examination before it decided whether to grant or deny the application.

[16] Because under Alaska law, the jury could award punitive damages on evidence that Aetna acted with reckless indifference to Ace's interests, it is not necessary to address the court's findings with respect to malice and bad motives.

[17] See note 7, *supra*.

Aetna in evaluating disability claims;[18] (3) failing to investigate the claim and to seek or request the supporting information alleged to be missing; (4) failing to assist the claimant in presenting her disability claim;[19] (5) relying on outdated prognoses of the claimant's expected recovery and disregarding recent reports of her actual condition; (6) denying her claim based on an undefined "requirement" not a term of her policy and contrary to Aetna's internal claim adjustment guidelines; (7) falsely advising the claimant that Aetna had no claim adjustment guidelines; and (8) making a last-minute demand for an IME after having denied the claim.

In evaluating the sufficiency of the evidence, the district court failed to consider it as a whole and to resolve all inferences in favor of the jury's verdict. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."). Viewing the evidence in the light most favorable to the nonmoving party, we cannot say the evidence does not reasonably support an award of punitive damages.[20]

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[18] Alaska law requires the insurance company to provide a reasonable explanation of the basis in the policy for denial of a claim. Alaska Stat. §§ 21.36.125(l) and (14).

[19] Alaska law requires an insurer upon receipt of notice of a claim, promptly to provide the necessary claim forms, instructions and assistance so that the claimant is able to comply with all reasonable requirements. Alaska Admin. Code tit. 3, § 26.040(a)(3) (1997).

[20] The two cases on which the district court relied, *State Farm Mut. Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), and *Nicholson*, 777 P.2d 1152, are inapposite. Both involved negotiations leading to disputes between the insured and the carrier

2. Conditional Grant of New Trial — Punitive Damages

We have jurisdiction to review the conditional grant of a new trial order under Fed. R. Civ. P. 50(c)(1). *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 190 n. 15 (9th Cir. 1989). The district court's order stated in relevant part:

> In general the court agrees with the arguments advanced by defendant and therefore grants the motion for a new trial as to the claim for punitive damages such that if the court of appeals should reverse this court's decision on the punitive damages claim there will be a new trial on that claim.

Rule 50(c)(1) states that the court "shall specify the grounds for granting the motion for the new trial." The court failed to do so here, at least explicitly, but it is a fair inference that it granted a new trial for the same reasons for which it granted judgment as a matter of law. The court's failure to rule on Aetna's request for a remittitur or to base its new trial order specifically on the magnitude of the punitive damage award, as opposed to the fact of the award, leads us to the conclusion that the new trial was granted on the erroneous ground that the evidence was insufficient as a matter of law. While our review of an order granting a new trial is for abuse of discretion, "a stringent standard applies when the motion is based on insufficiency of the evidence." *EEOC* v. *Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997) (internal quotations omitted) (quoting *Venegas* v. *Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987). A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict "is against the great weight of the evidence,

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over the amount to be paid on the insured's damage claim, the court holding that the evidence did not support a finding of "outrageous" conduct. Neither involved denial of coverage or benefits or other misconduct by the carrier.

or it is quite clear that the jury has reached a seriously erroneous result." *Id.*; *Roy* v. *Volkswagen of Am., Inc.*, 896 F.2d 1174 (9th Cir.), *as amended by* 920 F.2d 618 (9th Cir. 1990). The court made no such finding and the record would not support it.

Rule 50(c)(1) further provides that where "the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered." The rule contemplates that in a case such as this, we may give direction for further proceedings. *See* 28 U.S.C. § 2106 ("any [ ] court of appellate jurisdiction may . . . remand the cause and direct the entry of such . . . order . . . as may be just under the circumstances").

While the evidence was sufficient as a matter of law to support an award of punitive damages, whether the award was excessive is a different issue.[21]

> A punitive damage award is excessive if it is manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law. Relevant factors include the compensatory damage amount, magnitude of the offense, importance of the policy violated and the defendant's wealth.

Alaskan Village, 720 P.2d at 949; see also *Sturm, Ruger & Co.*, 594 P.2d at 48; *Pluid* v. *B.K.*, 948 P.2d 981, 983 (Alaska 1997) (per curiam). No single factor is dispositive. *Sturm, Ruger & Co.*, 615 P.2d at 624 & n.3. The award must also pass muster under federal due process analysis. *BMW* v. *Gore*, ___ U.S. ___, 116 S. Ct. 1589, 1599-1604 (1996) (identifying as "guideposts" that must be considered: (1) "degree of reprehensibility of the defendant's conduct"; (2)

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[21] Aetna does not contend that the award was the product of passion or prejudice.

"ratio [of punitive damage award] to the actual harm inflicted on the plaintiff"; and (3) "[c]omparing the punitive damage award and the civil or criminal penalties that could be imposed for comparable misconduct").

Our review of the reported Alaska decisions leads us to the conclusion that the punitive damage award was excessive. Although not dispositive itself, the ratio of punitive-to-compensatory damages — 130 to 1 — is much higher than any ratio approved by Alaska state courts. Moreover, the amount of punitive damages far exceeds the potential civil and criminal penalties for Aetna's actions.[22] The trend of reported Alaska decisions (subject to some variation taking into account unusual factual situations) reflects approval of punitive damage awards on the order of two to three times the amount of compensatory damages.[23] Taking all relevant factors into account, we conclude that Alaska courts would not approve an award in excess of three times compensatory

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[22] The maximum fine under the applicable provisions of the Alaska criminal code is $500,000. Alaska Stat. §§ 11.46.600(a)(2), 12.55.035(c)(1)(A).

[23] *See Pluid,* 948 P.2d at 984, 986 (upholding jury's 5-to-1 ratio of punitive to compensatory damages); Day, 615 P.2d at 624 (remitting jury punitive damage award, resulting in a 3.6-to-1 ratio); *Alaska Ins. Co.* v. *Movin' On Constr. Inc.*, 718 P.2d 472, 475 (Alaska 1986) (upholding 3-to-1 ratio); *Teamsters Local 959* v. *Wells,* 749 P.2d 349, 361 n.26 (Alaska 1988) (upholding 2.54-to-1 ratio); *Ben Lomond, Inc.* v. *Cambell,* 691 P.2d 1042, 1048 (Alaska 1984) (upholding 2.38-to-1 ratio); *Alaskan Village,* 720 P.2d at 949 (upholding 2-to-1 ratio). *Cf. Cameron* v. *Beard,* 864 P.2d 538, 551 (Alaska 1994) (upholding 70-to-1 and 45-to-1 ratios). In *Cameron,* however, in addition to the $1,000 in compensatory damages received from each of the two individual defendants, the plaintiff also recovered $700,000 in actual damages from the State, another defendant. Id. at 544. Thus, the overall ratio of punitive to compensatory damages was 1-to-6.

damages in this case. Following the lead of the Alaska Supreme Court in *Sturm, Ruger & Co.*, 615 P.2d at 624, we will remand with directions to the district court to enter an order denying a new trial on punitive damages conditioned on Ace accepting a remittitur of punitive damages to $381,000. *See American Nat'l Bank & Trust* v. *Regional Transit Auth.*, 125 F.3d 420, 437 (7th Cir. 1997) ("We, like the district court, certainly have the authority to grant a new trial or a remittitur if the circumstances so warrant."); *In re Torcise*, 116 F.3d 860, 869 (11th Cir. 1997) (remanding with directions to enter remittitur in specified amount or, if plaintiff does not accept, a new trial).

3. Denial of Aetna's Motion for Judgment—Bad Faith Liability

The district court's denial of Aetna's motion may be reversed only if the evidence, construed in the light most favorable to Ace, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury's. *Acosta* v. *City & County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir.), *cert. denied sub nom., Yawczak* v. *Acosta*, ___ U.S. ___, 117 S. Ct. 514, 136 L. Ed. 2d 403 (1996). We review *de novo* the denial of a motion for judgment as a matter of law. *Id.*

To prove bad faith, a plaintiff must establish "the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Hillman* v. *Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1324 (Alaska 1993) (quoting *Anderson* v. *Continental Ins. Co.*, 271 N.W.2d 368, 376-77 (Wis. 1978)). As the foregoing discussion shows, the court's denial of judgment as a matter of law is supported by the evidence that (1) Aetna did not investigate Ace's claim and shifted the burden of investigating

entirely to her;[24] (2) Aetna did not gather any medical records, contact Ace's lawyers, or telephone Ace or her employer to obtain evidence relevant to her claim; (3) Aetna failed to disclose the standard it was obliged to use in evaluating a disability claim; (4) Aetna failed to provide a reasonable explanation for its denial of Ace's claim; (5) Aetna acted unreasonably in reviewing Ace's records by relying on outdated prognoses of her expected recovery and ignoring more recent reports on her actual condition; (6) Aetna failed to answer Ace's questions and to tell her what documents to submit in support of her claim; and (7) Aetna knew that Ace suffered from a chronic condition that had been predicted to deteriorate.

The foregoing discussion also disposes of Aetna's appeal from the denial of a new trial on its bad faith liability.

4. Denial of Aetna's Motion for New Trial on the Award of "Emotional Distress" Damages

Aetna appeals the denial of a new trial on the award of "emotional distress" damages, asserting that the district court erred by failing to instruct the jury that a plaintiff seeking emotional distress damages must prove that her distress was "severe" before any damages may be awarded. We review the denial of a new trial for abuse of discretion. *Wharf* v. *Burlington N. R.R. Co.*, 60 F.3d 631, 637 (9th Cir. 1995). We hold that the district court did not abuse its discretion in denying Aetna's motion for a new trial.

Under Alaska law, breach of the implied covenant of good faith and fair dealing is actionable in tort against insur-

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[24] Aetna's claim handling guidelines instruct claims handlers to: "Obtain all available pertinent facts, not just those that are favorable to the company. Develop the claimant's case as well as the company's. If he is being treated by different doctors, obtain medical information from all of them."

ers. *Nicholson*, 777 P.2d 1152. Emotional distress is a category of damages in a bad faith case but is not an element of the claim. Alaska courts have never explicitly limited recovery of emotional distress damages in bad faith insurance cases to those instances where the plaintiff has shown "severe" emotional distress. However, Aetna interprets *Chizmar* v. *Mackie,* 896 P.2d 196 (Alaska 1995), a negligent infliction of emotional distress case, as requiring plaintiffs seeking emotional distress damages from any type of tort to prove that their distress was "severe" before any damages may be awarded.[25]

Aetna's reliance on *Chizmar* is misplaced. The requirement that the damages be "severe" is an element of the underlying torts of negligent and intentional infliction of emotional distress, but not of the tort of breach of the duty of good faith and fair dealing by an insurer to an insured. Chizmar, 896 P.2d at 204 (negligent infliction); *Cameron* v. *Beard*, 864 P.2d 538, 548 (Alaska 1993) (intentional infliction). Aetna contends that the elements of the two torts, intentional infliction of emotional distress[26] and bad faith

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[25] Aetna also relies on *Hillman,* 855 P.2d. at 1324. *Hillman* cites a Wisconsin case, *Anderson,* 271 N.W.2d at 376-77, which required severe emotional distress, but uses the case to explain the objective and subjective elements of bad faith. The *Hillman* court did not address the severity of the emotional distress damages that must be proved or cite to the *Anderson* court's discussion of this issue. The fact that the court relied on one portion of the *Anderson* opinion does not support the claim that it also adopted other parts of the opinion.

[26] Under Alaska law, a claim for intentional infliction of emotional distress has three elements: (1) the defendant's conduct is extreme and outrageous; (2) the conduct is intentional or reckless; and (3) the conduct causes severe emotional distress. *Bishop* v. *Municipality of Anchorage,* 899 P.2d 149, 155 (Alaska 1995) (citing *King* v. *Brooks,* 788 P.2d 707, 711 (Alaska 1990)).

breach, are so similar that any attempt to distinguish them would be artificial. The argument overlooks the fact that Alaska courts have treated intentional infliction of emotional distress and bad faith breach cases differently. For instance, under Alaska law, a plaintiff cannot sustain a claim for intentional infliction of emotional distress unless the defendant's conduct rises to the level of outrageousness, which would warrant a punitive damage award. *Hawks* v. *Department of Pub. Safety,* 908 P.2d 1013, 1015 (Alaska 1995) (citing *Richardson* v. *Fairbanks N. Star Borough,* 705 P.2d 454, 456 (Alaska 1985)). However, a plaintiff may successfully bring a bad faith breach claim and recover compensatory damages where the evidence was insufficient to support an award of punitive damages because it did not show that the insurer's actions were outrageous or reckless. *Nicholson*, 777 P.2d at 1158; *Weiford,* 831 P.2d at 1267.

Moreover, the policy considerations for requiring severity to be shown do not support applying the requirement to bad faith insurance cases. As the court said in *Chizmar,* "The basic assumption underlying the traditional rule is that emotional distress without physical injury is relatively trivial and easily feigned." *Chizmar,* 896 P.2d at 201. In contrast, when an insurance company wrongly refuses to honor its obligations, emotional distress is a natural and believable response. Insureds bargained and paid for the security and peace of mind of knowing that reimbursement and financial support will be provided in the event that a misfortune occurs. As insurance payments often serve as a safety net for the insured, Aetna's refusal to cover Ace's injury is foreseeably egregious.

The fact that the Alaska courts have applied the tort of bad faith breach only to insurance contracts between the insurer and the insured further demonstrates that these policy considerations do not come into play. *See Nicholson,* 777 P.2d at 1157. By allowing insureds to bring the action in tort, Alaska courts have relieved plaintiffs of the obligation of

bringing a separate tort claim for negligent or intentional infliction of emotional distress. However, unlike a plaintiff in an insurance case, a plaintiff bringing a claim for bad faith breach of an employment contract would have to independently establish the tort of negligent or intentional infliction of emotional distress to recover emotional distress damages. *See, e.g., ARCO Alaska, Inc.* v. *Akers,* 753 P.2d 1150, 1153-54 (Alaska 1988) (no independent tort for breach of good faith and fair dealing in an employment contract).

CONCLUSION

We AFFIRM the denial of Aetna's motions for judgment as a matter of law on bad faith liability, for a new trial on bad faith liability and for a new trial on emotional distress damages. We REVERSE the grant of judgment as a matter of law on punitive damages and we VACATE the conditional grant of a new trial on punitive damages. We REMAND with direction to enter an order denying Aetna's motion for new trial on punitive damages on condition that Ace accepts a remittitur of punitive damages to $381,000.

FLETCHER, Circuit Judge, Dissenting:

I respectfully dissent from that portion of the opinion that would have our court dictate the amount of punitive damages for the purposes of remittitur. The majority picks a multiple of 3 out of the air, stating only that we are "taking all relevant factors into account . . ." Majority at 2268.

The Alaska Supreme Court has recently stated that "[t]he ratio between compensatory and punitive damages is merely a factor to be taken into account and we have never laid out a definitive permissible ratio." *Pluid* v. *B.K.*, 982 P.2d 981, 985 (Alaska 1997). The issue is one of state law. We should not imperially delegate to ourselves the decision as to what that ratio should be. When reviewing an award of punitive damages, Alaska courts look to a number of factors to

determine what is "manifestly unreasonable." *Id.* at 984. "Relevant factors include the compensatory damage amount, magnitude of the offense, importance of the policy violated, and the defendant's wealth." *Id.* If we had an adequate record and, in fact, could and did review the relevant factors, we could determine what is too much, but certainly not what is enough.

The majority pays only lipservice to the Alaska Supreme Court's determination that the facts, and not the ratio, drive the results of a review of punitive damages. The majority notes that the jury awarded a 130-1 ratio of punitive to compensatory damages and that Alaska typically approves "of punitive damage awards on the order of two to three times the amount of compensatory damages." Majority at 2267-68. Waving its judicial wand and invoking the incantation — [t]aking all relevant factors into account," the majority divines the proper award of damages to be three to one. *Id.*

The majority has engaged in no meaningful analysis. It does not even attempt to compare the facts of this case with those of other cases where different multipliers were approved. Were it our business to set maximums, the facts of this case would support a much higher award. The three discretionary factors outlined by *Pluid,* would support a much higher multiple. First, as to the "magnitude of the offense," we need only look to the harm caused to Ace, harm that her insurance was intended to avoid. She lost everything she had, including her home; she had to live in her car; and she had to send her child away because she couldn't care for him. Next, with respect to the "importance of the policy violated," Aetna's wrongful and bad faith refusal to cover Ace implicated a much broader company policy of wrongfully denying coverage to many who met the definition of "disabled," exhibiting a callous breach of trust owed to their insureds at a time when they are most vulnerable. Finally, the "defendant's wealth," is estimated at 1.7 billion dollars and the evidence presented demonstrates that Aetna's assets

would not be sufficiently diminished by the punitive damages award set by the majority. Punitive damages by definition are to be adequate in amount to punish the offender.

All of these factors weigh heavily in favor of a substantial award to Ace. In *Pluid,* a sexual battery case, the Alaska Supreme Court affirmed a 5-1 ratio of punitive damages to compensatory damages. *Id.* at 984. I see nothing in the opinion that suggests that the Alaska Supreme Court found this ratio to be high or even near the limit that would be acceptable. Certainly nothing in *Pluid* suggests that a 3-1 ratio represents a "standard." Indeed, there is strikingly little evidence of Alaska courts disturbing jury awards at all. Of the cases cited by the majority, the Alaska courts disturbed the jury's punitive damages award in only two, *Alaska Ins. Co.* v. *Movin' On Constr. Inc.*, 718 P.2d 472, 475 (Alaska 1986) (reducing punitives damages proportionally to a reduction of compensatory damages because it appeared that the jury had set punitives itself by using a 3 to 1 ratio); and *Sturm, Ruger & Co.* v. *Day,* 615 P.2d 621, 624 (Alaska 1980) (on rehearing increasing a cap it had previously set on the punitive damages from $250,000 to $500,000).

In *Sturm, Ruger & Co.*, the Alaska Supreme Court was dealing with its own law under the facts presented in that case. If we compare the facts of *Sturm, Ruger & Co.* to our facts, this case involves more egregious facts, a more important relationship — that of the insured to the insurer, and a greater likelihood of reoccurrence. Even so the Alaska Court set a ratio significantly higher in *Sturm, Ruger & Co.* than the majority sets here. Of the other cases cited by the majority, not only were the awards left undisturbed but the underlying facts and public policy concerns appear to have been less compelling than those before us. Moreover, in a later case, the Alaska Supreme Court denied a request to fix the amount of punitive damages at the appellate level. It explained that *Sturm, Ruger & Co.* was a case where "[i]t was only after an extensive trial record was established that

the appellate court reduced the award of punitive damages." *Pletnikoff* v. *Johnson,* 765 P.2d 973, 978 (Alaska 1988). It went on to state, as did the court in *Pluid,* that "[w]e have noted on numerous occasions that the factors to consider in awarding punitive damages are the amount of compensatory damages and, more importantly, the magnitude and flagrancy of the offense, the importance of the policy violated, and the wealth of the defendant." *Id.* at 978-79. As a federal appellate court, we have no business setting the amount of the remittitur in this case. The majority ignores the fact that a motion is pending before the district court to grant a remittitur. It should be ruled upon by the district court in the first instance where a proper record can be made.

APPENDIX D

MINUTES OF THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. J94-0018 CV (JWS)

SHERRIE ACE

v.

AETNA LIFE INSURANCE CO.

THE HONORABLE JOHN W. SEDWICK

Deputy Clerk, Pam Richter

Official Recorder, _____

APPEARANCES: for Plaintiff: -----

for Defendant: -----

PROCEEDINGS: **ORDER FROM CHAMBERS**

[Filed September 9, 1996]

The court has considered the motion for new trial at docket 228 and the opposition thereto. In general the court agrees with the arguments advanced by defendant and therefore grants the motion for a new trial as to the claim for punitive damages such that if the court of appeals should reverse this court's decision on the punitive damages claim there will be a new trial on that claim.

The question of whether there should be a new trial on the underlying tort claim for compensatory damages is a closer question. The court resolves that issue in favor of plaintiff.

The motion at docket 228 is GRANTED IN PART AND DENIED IN PART as set forth above.

ENTERED AT JUDGE'S DIRECTION
INITIALS: prr
DATE: September 9, 1996 Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Case No. J94-018 CV (JWS)

SHERRIE ACE, PLAINTIFF,

vs.

AETNA LIFE INSURANCE CO., DEFENDANT.

(Motion for Judgment, as
Matter of Law — Docket 214)

[Filed: July 2, 1996]

ORDER FROM CHAMBERS

MOTION PRESENTED

Plaintiff Sherrie Ace ("Ace") applied for disability benefits pursuant to an insurance policy issued by Aetna Life Insurance Company ("Aetna") . Aetna denied the application, and Ace sued, alleging that Aetna denied her claim in bad faith, and seeking compensatory and punitive damages. A jury trial was conducted in Juneau, Alaska, from May 20, 1996 through May 30, 1996. Upon conclusion of plaintiff's case, Aetna moved for judgment as a matter of law, which the court denied. At the close of all the evidence, Aetna again moved for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50. The court took the motion under advisement. The case was submitted to the jury, which returned a verdict for Ace awarding compensatory damages of $127,009 and punitive damages of $16,500,000. Aetna renewed its motion and the court invited further briefing.

Defendant's memorandum was filed at docket 214 and plaintiff's memorandum was filed at docket 216. No party has requested additional oral argument, and it would not be of material aid to the court.

This order also addresses plaintiff's motion at Docket 212, which requests that prejudgment interest begin to accrue on March 3, 1993.

DISCUSSION

1. Jurisdiction; Governing Law

This court has jurisdiction under 28 U.S.C. § 1332. The applicable substantive law in this diversity action is the law Alaska. *The Home Indemnity Co.* v. *Lane Powell Moss and Miller*, 43 F.3d 1322, 1325 (9th Cir. 1995).

2. Rule 50 Standard

Judgment as a matter of law is proper if the only reasonable conclusion supported by the evidence presented at trial would require judgment for the moving party; it is not proper where there is substantial evidence to support a judgment for the non-moving party. Evidence must be considered in the light most favorable to the non-moving party. *E.g.*, *Morgan* v. *Woessner*, 997 F.2d 1244, 1252 (9th Cir. 1993).

3. Insurance Bad Faith and Punitive Damages

The Alaska Supreme Court recognized a cause of action in tort for bad faith handling of a first party insurance claim in *State Farm Fire & Casualty Company* v. *Nicholson*, 777 P. 2d 1152 (Alaska 1989). The Alaska court explained that the tort cause of action arises from a breach of the covenant of good faith and fair dealing implied in the insurance contract. The court chose to allow a cause of action in tort for conduct which in other contexts would give rise only to a claim for breach of contract in recognition of the adhesionary nature of insurance contracts and to afford an adequate remedy to

insureds who would not be able to recover consequential damages on a contract cause of action. *Nicholson*, 777 P.2d at 1155-57. Noting that, as a tort cause of action, an insurance bad faith claim could support an award for punitive damages, the *Nicholson* court cautioned that such a cause of action cannot support an award of punitive damages unless the plaintiff can prove that the insurer engaged in conduct which was "outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another." 777 P.2d at 1158 (quoting *Sturm, Ruger & Co.* v. *Day*, 594 P.2d 38, 46 (Alaska 1979), *overruled on other grounds*, *Dura Corp.* v. *Harned*, 703 P.2d 396 (Alaska 1985)).

In *Nicholson*, and again in *State Farm Mutual Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), the Alaska Supreme Court made it clear that there are circumstances under which the evidence may be sufficient to present a jury question on a bad faith claim, but insufficient to support a claim for punitive damages. In both cases, the Alaska court found wanting evidence of the outrageous conduct required to warrant punishment.

In addition to the need to establish truly outrageous behavior, under Alaska law, a plaintiff has a higher burden of proof for the recovery of punitive damages than for the recovery of compensatory damages. To recover punitive damages, a plaintiff must prove the elements of her case by clear and convincing evidence. AS 09.17.020. This legislative recognition of the "narrow limits in which punitive damages should be allowed", *Weiford*, 831 P.2d at 1266 n. 2, is a corollary to the Alaska Supreme Court's admonition that punitive damages, "are not favored in law" and "are to be allowed only with caution and within narrow limits." *Weiford*, 831 P.2d at 1266 (quoting *Alaska Placer Co.* v. *Lee*, 553 P.2d 54, 61 (Alaska 1976)).

The facts in *Nicholson* were summarized by the Alaska court as follows:

In February, 1983 a water main . . . broke. The water main . . . ran (underground] beside the Nicholson house and other houses. . . . The escaping water caused the soil underneath the house to erode and settle. More than a year later, on March 27, 1984, the Nicholsons first contacted State Farm to report the loss. On April 6, 1984 Vere Hotchkiss, claims adjuster for State Farm, made an initial on-premise inspection, and returned again on April 11, 1984 with an engineer to conduct another inspection. Relying on the . . . engineering report which stated two possibilities for the loss *i.e.* water alone or permafrost and earth settling, State Farm denied coverage on April 22, 1984, because its policy contained an exclusion for [the second possibility]. Furthermore the . . . report recommended that the Nicholson house be observed during the winter of 1984-1985 to determine if any more settling would occur. Another consulting engineering report agreed . . ..

In the meantime State Farm agreed to cover the Nicholson's next door neighbor for the same loss. On June 14, 1984 State Farm now agreed to extend coverage to the Nicholsons for their loss and requested them to obtain property appraisals. On August 15, 1984 a general contractor . . . declined to give a repair estimate to the Nicholsons until a soil survey was performed [which was done during the 1984-85 winter]. During this time the Nicholsons experienced electrical and structural problems in their house. They were upset with the delay in fixing their house.

On May 29, 1985, a new State Farm adjuster [directed the Nicholsons to contact Pac-Rim Construction Services for an estimate on repair or replacement of the house.] The Pac Rim report was issued on June 14, 1985 [with estimates] well in excess of the policy limits of $113,264.

> State Farm then obtained an appraisal of the property [in the amount of] $98,200, and offered to pay that amount plus additional reimbursement for repair or replacement costs up to the policy limits. The offer was made on October 9, 1985. The Nicholsons rejected this offer and filed suit . . . .

777 P.2d at 1153-54. In the October 9, 1985 letter, State Farm also required the Nicholsons to complete a sworn statement of loss within 60 days. *Id.*, 777 P.2d at 1154 n. 1.

The *Nicholson* case was tried to a jury which returned a verdict awarding compensatory damages and punitive damages.[1] At trial:

> State Farm offered testimony from several witnesses that the adjustment of this claim was highly unusual, difficult, and complex. The Nicholsons offered testimony from Robert Lowe, as an expert independent claim adjuster, that State Farm's delay in deciding coverage and settlement of the claim was unreasonable and outrageous.

777 P.2d at 1154. Recognizing that State Farm's wrongful acts constituted a tort, the *Nicholson* court then addressed the sufficiency of the evidence to support an award of punitive damages. The court had no trouble concluding that it did not. "Based upon the factual scenario [set out at length above] we conclude that there was insufficient evidence as a matter of law to support a finding of outrageous conduct or a gross deviation from an acceptable standard of reasonable conduct in order to sustain an award of punitive damages." 777 P.2d at 1158.

In *State Farm Mutual Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), the Alaska court again examined

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[1] In *State Farm Fire & Casualty Co.* v. *Nicholson*, 777 P.2d 1152 (Alaska 1989), the jury awarded $107,500 in compensatory damages and $7,500 in punitive damages.

the sufficiency of evidence presented in a bad faith case where a jury had awarded both compensatory and punitive damages.[2] The court found that the evidence was sufficient to present a jury question on the bad faith claim, but insufficient to support a claim for punitive damages. Linda Weiford was injured in an automobile accident in August of 1984. She attempted to collect benefits under her uninsured motorist policy issued by State Farm. In October, 1984, she was diagnosed with a cervical strain. She initially demanded $17,500 and State Farm initially offered $3,408. After further negotiations, State Farm offered $5,000, and Weiford progressively reduced her demand until it was $10,000. In July 1986, Weiford was diagnosed with a nerve root injury at the seventh cervical vertebra, which injury the physician thought was attributable to the auto accident. Weiford then demanded the $25,000 policy limit and State Farm offered $7,500. Further negotiations brought State Farm up to $12,500, while Weiford reduced her demand to $18,500. Anticipating arbitration, State Farm requested that Weiford undergo an independent medical exam ("IME"). She agreed, and the IME confirmed the nerve root injury. State Farm then offered $17,500, which was countered by Weiford at $21,000. Prior to the arbitration, State Farm increased its offer to $20,000, but that was rejected. The arbitration resulted in an award to Weiford of $22,000, which State Farm paid. Weiford then sued for bad faith in the handling of her claim.

On appeal, Weiford argued that the award of punitive damages was justified because State Farm had adopted a "tough stance" policy on claim payments in 1984 and 1985 which led State Farm adjusters to make unreasonably low offers to Weiford. Weiford also pointed to a State Farm

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[2] In *State Farm Mutual Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), the jury awarded $18,007.50 in compensatory damages and $1,200,000 in punitive damages.

supervisor's note that indicated that State Farm should not exceed $20,000 in its offers to Weiford prior to arbitration, because with a policy limit of only $25,000, the insured would have more to lose at arbitration than the insurer.

As in *Nicholson*, the Alaska court let the compensatory damage award stand but found the evidence insufficient to support an award of punitive damages. The court wrote: "In our view, while there is some evidence which would justify a finding that State Farm was acting in bad faith, none of the evidence shows conduct that may fairly be categorized as outrageous." 831 P.2d 1261. Addressing Weiford's claim about the unreasonably low initial offers, the court noted the following:

> Given [plaintiff's expert's] testimony, the $5,000 offer might support a fact finder's conclusion that State Farm was guilty of bad faith. However, because of Weiford's high level of physical activity, the absence of definitive medical test results in 1985 and the fact that Weiford's physicians evidently believed that her injury would be self resolving, even this conclusion is fairly debatable. The evidence will not reasonably support the further conclusion that this offer was so low as to be outrageous.

831 P.2d at 1268 (footnote omitted).

4. Evidence In The Case At Bar

In their memoranda, the parties have set forth in considerable detail the evidence which was presented to the jury. Most of the evidence is listed or described at Docket 214 pp. 8-20, 22-27, 34-38, 42 and Docket 216 pp. 15-19, 23-26. A comparison of the parties, briefing discloses a considerable disagreement over the conclusions which may be drawn from the evidence presented, but no disagreement over what evidence was presented to the jury. The parties have adequately set forth the evidence presented, making it unnecessary to repeat it here.

5. Sufficiency of Evidence

Viewed in the light most favorable to Ace, this court concludes that a reasonable jury could have concluded that Aetna breached its obligation to deal fairly and in good faith with Ace in the processing of her claim for disability benefits, but that no reasonable jury could find that there was clear and convincing evidence that Aetna's conduct was outrageous.

Aetna had an obligation to investigate Ace's claim. However, up to the point at which Aetna made arrangements for the IME, rather than initiate inquiries of its own, Aetna relied upon Ace to present information to it. Aetna persisted in this approach even after it had reason to know that Ace's family doctor, Dr. Kiessling, held the opinion that Ace was disabled. While it is true that Dr. Kiessling had earlier opined that Ace's condition was substantially better, and it is also true that Dr. Kiessling did an abysmal job of explaining why his opinion had changed, Aetna nevertheless was alerted to the fact that one physician believed that Ace's condition had deteriorated to the point that she was disabled. Further, Dr. Kiessling's second opinion was the most recent opinion available to Aetna. Aetna also knew from the medical records that Ace's initial leg injury produced major damage and a chronic orthopedic condition which had already required several surgeries and was expected to require a complete replacement of her injured knee. On the other hand, Aetna also had received the opinion of Dr. Richard McEvoy ("Dr. McEvoy"), the orthopedic physician most familiar with Ace's condition, indicating that she could go back to work.

Although it is a close question, particularly in light of the fact that where an insurer has an objectively reasonable basis for denying a claim the denial does not constitute bad faith,[3]

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[3] *Hillman* v. *Nationwide mutual Fire Ins. Co.*, 758 P.2d 1248 (Alaska 1988) .

this court concludes that when all the evidence is viewed in the light most favorable to Ace, a reasonable jury could have found that Aetna acted in bad faith by not promptly making some affirmative inquiry after receiving Dr. Kiessling's second opinion. It bears emphasis that Ace was making a claim for disability in circumstances where the insurer had reason to know she suffered from a chronic condition that had been predicted to deteriorate. For the company to have continued to demand that Ace bring additional evidence to it in such circumstances could reasonably be viewed as unfair disregard for Ace's interest under the insurance contract.

The punitive damages issue must be evaluated in light of the Alaska court's holdings in *Nicholson* and *Weiford*. These cases underscore the fact that evidence of bad faith violation of the insurance contract is not enough to warrant imposition of punitive damages. The Alaska court requires proof of outrageous behavior. Moreover, the proof must be clear and convincing. With the examples provided by *Nicholson* and *Weiford* in mind, an examination of the evidence in the case at bar discloses inadequate support for the proposition that Aetna's conduct was clearly and convincingly "outrageous," represented "malice" toward Ace, was caused by "bad motives" or displayed a "reckless disregard" for Ace's interest.

There is no direct evidence that Aetna acted with malice toward Ace or from bad motives. Of course, such conditions may also be proved indirectly by inference from other evidence, *Alyeska Pipeline Service Co.* v. *O'Kelley*, 645 P.2d 767, 774 (Alaska 1982). Ace urges that evidence of bad motives or malice will be found in the fact that Aetna quoted the policy language respecting "any gainful occupation" in correspondence with Ace, rather than offering an explanation that the policy language could not be taken literally.

The "any gainful occupation" language quoted was the language actually used in a contract entered by Ace's

employer, the State of Alaska. The language was not language inserted into a policy presented to an individual insured on a take it or leave it basis. The language was contained in a contract between Aetna and a state government. The language was not actually employed by Aetna to deny benefits to Ace. Ace's qualification for disability benefits turned upon whether she was able to go back to work at her own job. That this was the central issue was clearly known by all the Aetna personnel involved in handling the claim. Whatever might be said about quoting back the "any gainful occupation" language in some other context, it is unreasonable to conclude that on the facts here it shows any malice toward Ace.

Ace argues that quoting back the "any gainful occupation" language also shows a bad motive: by quoting back a standard far higher than the law would allow Aetna to enforce literally, Aetna discourages claimants and bolsters its own bottom line. On the other hand, the evidence shows that Aetna uses the language in very few disability contracts and does not employ it literally. Significantly, there is no evidence in the record that Ace's hypothesis is viable. Ace was certainly not discouraged. Nor is there evidence that the language has discouraged anybody else. All Ace offered to support the viability of the hypothesis was the opinion of her expert, Barbara Paul. However, Ms. Paul offered no basis for her opinion. She had no relevant knowledge at all about claims experience under the State of Alaska insurance program in which Ace was enrolled, nor could she cite evidence from any other source to support her opinion. On the other hand, there was uncontradicted testimony from Steve Elliott and Bryan Southall, who currently are engaged in processing disability claims under both the rare "any gainful occupation" standard and more common modern formulations, that they have observed no difference in the behavior of insureds. There was also uncontradicted

testimony from Aetna's expert, Burt Bernstein, that Ms. Paul's opinion is not supported by the literature.

Even if one were to disregard all of the evidence on this point completely except Ms. Paul's speculation, her opinion is simply not clear and convincing evidence of a bad motive. It is a substantial reach from the hypothesis that accurately quoting back the "any gainful occupation" contract language in today's heavily lawyered society would possibly discourage disabled insureds from pursuing their rights to the conclusion that the possibility is considered a reality by Aetna such that a bad motive may be inferred. The vastly more reasonable inference is that in order to avoid claims against it based upon alleged misrepresentation by its claims processors, Aetna is careful to require such personnel to refer to the contract language in correspondence with claimants.

The manner in which Ace's claim was actually handled in terms of the information available to Aetna at each step in the process cannot support an inference of malice or bad motives. At all times, Aetna had knowledge of Dr. McEvoy's opinion which, given his role in Ace's care, was never persuasively contradicted by any other information. Moreover, the lay claims personnel referred the medical information to a qualified physician, Dr. Galvin, for review. He found no basis for concluding Ace was disabled. Despite Dr. Galvin's opinion, Aetna did make arrangements for an IME. Surprisingly, Ace declined the IME.

The evidence does not clearly and convincingly support the proposition that Aetna acted in "reckless disregard" for Ace's interest. A jury could find that by requiring the insured to marshall [sic] all the information, especially after Dr. Kiessling's second opinion was communicated, it is more likely than not that Aetna acted with enough disregard for Ace's interest to represent bad faith sufficient to breach the contract (and simultaneously give rise to the tort claim), but the same evidence cannot support a finding that Aetna's

disregard for Ace's interest was clearly and convincingly reckless to the point that Aetna should be punished. Plainly put, there is nothing outrageous about relying on the opinion of the most knowledgeable physician, Dr. McEvoy, to the exclusion of what little contrary indication of Ace's condition had emerged prior to asking for an IME, the one procedure that could be expected to clear up any uncertainty.

The court has carefully reviewed the evidence and considered the other arguments advanced by the parties. The court finds no merit in Aetna's arguments that an award of compensatory damages cannot be supported by the evidence. A reasonable jury could find for Ace on that issue. Similarly, the court finds no merit in Ace's arguments that an award of punitive damages is supported by clear and convincing evidence. A reasonable jury could not find for Ace on that issue.

6. Prejudgment Interest

Under Alaska law prejudgment interest begins to accrue on the date that process is served or that written notice of a claim is given to the defendant, and such written notice must be adequate to advise a "prudent person" that a claim will be made. AS 09.30.070(b). Here, there is no dispute that Francine Harbour's letter of March 3, 1993, was an adequate written notice, but Aetna argues it was vitiated by Roger DuBrock's indication that Ace would go ahead with the IME. DuBrock did not tell Aetna that Ace would not follow up on Harbour's threatened lawsuit.

The decision in *Himschoot* v. *Shanley*, 908 P.2d 1035, 1042 (Alaska 1996) suggests that a trial court should look to all the circumstances in deciding what a prudent person would believe. Here, the circumstances are that after a clear written notice that suit would be filed, there was a temporary indication that additional information (the IME) would be provided, there was no withdrawal of the threat of suit, and the lawsuit eventually was filed. The court agrees with the

observation of Ace's counsel: "The test is what a prudent person would believe; not what an optimistic person would believe." Docket 217 at p. 2. Therefore, prejudgment interest began to accrue on March 3, 1993.

CONCLUSION

For the reasons and to the extent set forth above, the motion for judgment as a matter of law by Aetna is **GRANTED IN PART** and **DENIED IN PART**. The motion at docket 212 is **GRANTED**.

The Clerk is directed to enter judgment for Ace for compensatory damages only in the amount of $127,009 and to provide for prejudgment interest at the State of Alaska statutory rate of 10.5 percent per annum from March 3, 1993 to the date judgment is entered.

DATED this 2nd day of July, 1996, at Anchorage, Alaska.

/s/ John W. Sedwick
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

(2)

No. 98-230

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

AETNA LIFE INSURANCE COMPANY,

Petitioner,

v.

SHERRIE ACE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In concluding that the district court abused its discretion in granting a new trial, did the Ninth Circuit Court of Appeals err and apply a different standard of review than other Circuits apply when reviewing a new trial order?

2. Do this Court's due process cases concerning post-verdict review of punitive damages awards have any bearing on this case at this stage, since the district court has not yet conducted the proceedings required on remand to determine the proper amount of remittitur?

3. When the district court's order granting a new trial adopted without explanation the grounds asserted by the defendant and the record does not support *any* of the asserted grounds, did the appellate court err in reversing the new trial order without remanding the case to the district court for further explication of its decision?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Ace's Disability 3

B. Aetna's Wrongful Denial Of Ace's Disability Claim 4

C. District Court Proceedings 7

D. The Court Of Appeals Decision 8

REASONS FOR DENYING THE PETITION 10

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARD FOR SETTING ASIDE A JURY VERDICT BASED ON LEGALLY SUFFICIENT EVIDENCE 10

A. FRCP 50(c)(1) Explicitly Provides For Appellate Review Of An Order Conditionally Granting A New Trial 10

B. All Circuits Preclude A District Court From Casually Substituting Its View Of The Facts For The Jury's Verdict 12

C. *Gasperini* Did Not Modify The Applicable Standard of Review 18

D. Aetna's Petition Asks This Court To Re-Evaluate The Facts And Presents No Legal Issue Of Nationwide Importance 19

1. The appeals court applied the correct legal standard in reviewing an order entered with minimal explanation or analysis 19

2. The question whether a district court abused its discretion in granting a new trial on weight-of-evidence grounds is an intensely fact specific inquiry 22

II. THIS CASE DOES NOT IMPLICATE THE DUE PROCESS CONCERNS RAISED IN CASES INVOLVING POST-VERDICT JUDICIAL REVIEW OF THE AMOUNT OF PUNITIVE DAMAGES AWARDS 24

III. THERE IS NO REQUIREMENT THAT AN APPELLATE COURT REMAND A CASE TO THE DISTRICT COURT FOR A STATEMENT OF ITS REASONS FOR GRANTING A NEW TRIAL WHERE THE DISTRICT COURT STATED THAT IT ACCEPTED THE REASONS OFFERED BY THE DEFENDANT AND NONE OF THOSE REASONS JUSTIFY A NEW TRIAL 25

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: **Page(s)**

Ace v. Aetna Life Ins. Co.,
139 F.3d 1241 (9th Cir. 1998) . . . . . *passim*

Aetna Life Ins. Co. v. Orr,
169 S.W.2d 651 (Ark. 1943) 5

Atkins v. New York City,
143 F.3d 100 (2d Cir. 1998) 13

Atlas Food Systems & Services, Inc. v. Crane National Vendors, Inc.,
99 F.3d 587 (4th Cir. 1996) 13, 16

Baxter Healthcare Corp. v. Spectramed, Inc.,
49 F.3d 1575 (Fed. Cir.),
cert. denied, 516 U.S. 906 (1995) 14, 18, 27

Binder v. Long Island Lighting Co.,
57 F.3d 193 (2d Cir. 1995) 20

BMW v. Gore,
517 U.S. 559 (1996) 24

Bogosian v. Mercedes-Benz,
104 F.3d 472 (1st Cir. 1997) 13

Browning-Ferris Industries v. Kelco Disposal, Inc.,
492 U.S. 257 (1989) 10, 17, 19, 24

Carter v. DecisionOne Corp.,
122 F.3d 997 (11th Cir. 1997) 15

Collazo-Santiago v. Toyota Motor Corp.,
__ F.3d __, 1998 WL 363856
(1st Cir. July 9, 1998) 27

Computer Systems Engineering, Inc. v. Qantel Corp.,
740 F.2d 59 (1st Cir. 1984) 28

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 10, 20

Donovan v. Penn Shipping Co.,
429 U.S. 648 (1977) 19

Frumkin v. Mayo Clinic,
965 F.2d 620 (8th Cir. 1992) 27

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) 18, 19, 20

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512 U.S. 415 (1994) 24

Kelley v. Airborne Freight Corp.,
140 F.3d 335 (1st Cir. 1998) 18

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207 So. 2d 305 (Fla. App.),
cert. denied, 212 So. 2d 876 (Fla. 1968) 5

McNeal v. Hi-Lo Powered Scaffolding, Inc.,
836 F.2d 637 (D.C. Cir. 1988) 15

Mears v. Nationwide Mutual Ins. Co.,
91 F.3d 1118 (8th Cir. 1996) 14, 28

Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.,
106 F.3d 1388 (7th Cir. 1997) 14, 18

Miksis v. Howard,
106 F.3d 754 (7th Cir. 1997) 14

Neely v. Martin K. Eby Construction Co., Inc.,
386 U.S. 317 (1967) 11

Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.,
848 F.2d 613 (5th Cir. 1988) 28

Oiness v. Walgreen Co.,
88 F.3d 1025 (Fed. Cir. 1996),
cert. denied, 117 S. Ct. 951 (1997) 16

Pacific Mutual Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 24

Portage II v. Bryant Petroleum Corp.,
899 F.2d 1514 (6th Cir. 1990) 20

Powell v. Lititz Mutual Ins. Co.,
419 F.2d 62 (5th Cir. 1969) 27

Pryor v. Trane Co.,
138 F.3d 1024 (5th Cir. 1998) 14

Rosenfield v. Wellington Leisure Products, Inc.,
827 F.2d 1493 (11th Cir. 1987) 20

Santa Maria v. Metro-North Commuter Railroad,
81 F.3d 265 (2d Cir. 1996) 19

Sheridan v. E.I. DuPont de Nemours & Co.,
100 F.3d 1061 (3d Cir. 1996) (en banc),
cert. denied, 117 S. Ct. 2532 (1997) 13

Strickland v. Owens Corning,
142 F.3d 353 (6th Cir. 1998) 14, 16

Tennant v. Peoria & Pekin Union Railway Co.,
321 U.S. 29 (1944) 17, 19

TXO Production Corp. v. Alliance Resources Corp.,
509 U.S. 443 (1993) 24

United States v. Tobias,
899 F.2d 1375 (4th Cir. 1990) 27

Williamson v. Consolidated Rail Corp.,
926 F.2d 1344 (3d Cir. 1991) 20, 28

York v. American Telephone & Telegraph Co.,
95 F.3d 948 (10th Cir. 1996) 13, 15

Statutes and Rules:

Alaska Statute § 21.36.125 . . . . . 5, 9

3 Alaska Admin. Code § 26.040(a)(3) 9

3 Alaska Admin. Code § 26.050(a) 5

Federal Rule Civil Procedure 50 . . . . . 10, 11

Miscellaneous:

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§ 2805 28
§ 2806 16
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§ 2819 12

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§ 59.54 (3d ed. 1997) 17, 18

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case arises from an insurance bad faith suit filed in state court in Alaska and removed to federal court based on diversity jurisdiction. A properly instructed jury found that Aetna Life Insurance Company acted in bad faith in denying Sherrie Ace's claim for long-term disability benefits and further found by clear and convincing evidence that Aetna's conduct was outrageous and deserving of punitive damages under Alaska law.

In response to post-trial motions by Aetna, the district court upheld the jury's finding of bad faith and its award of compensatory damages, but granted judgment as a matter of law to Aetna on the issue of its liability for punitive damages. The district court also conditionally ordered a new trial on the issue of Aetna's punitive damages liability. The district court did not reach Aetna's alternative motion for a remittitur or a new trial on the amount of punitive damages.

Both Ace and Aetna appealed. The Ninth Circuit concluded that the district court erred in setting aside the portion of the jury's verdict finding Aetna liable for punitive damages. The panel determined unanimously that the evidence in the record amply supported the jury's determination that Aetna acted outrageously, with malice, bad motives, or a reckless indifference to Ace's interests, justifying punitive damages under Alaska law. The panel also unanimously reversed the conditional order granting a new trial on the question of Aetna's liability for punitive damages. However, the panel held that the amount of punitive damages awarded by the jury was excessive, and remanded the case to the district court to determine the appropriate remittitur. The Ninth Circuit rejected Aetna's cross-appeal arguments concerning the sufficiency of the evidence supporting the verdict on bad faith and the jury instructions on compensatory damages.

Aetna's petition for issuance of a writ of certiorari asks this Court to review three issues all ancillary to the central issues in this

case. The proceedings required on remand in the district court have not yet been held; there is no final judgment in this case. Thus, despite Aetna's attempts to call attention to the amount of punitive damages awarded by the jury, the size of the award is *not* an issue before this Court. Further, in this Court, Aetna does not challenge the appellate court's ruling upholding the verdict that Aetna acted in bad faith or the ruling reversing the grant of judgment as a matter of law on the issue of Aetna's liability for punitive damages. Thus, at this stage Aetna is bound by the findings of the jury and the Court of Appeals that a preponderance of evidence established that Aetna acted in bad faith in denying Ace's claim for long-term disability benefits and that clear and convincing evidence established that Aetna acted outrageously when denying Ace's claim. Aetna now contends only that the Ninth Circuit erred in reversing the district court's conditional order for a new trial on the question of Aetna's liability for punitive damages. Aetna seeks an order directing a partial new trial on punitive damages liability or, in the alternative, an order directing the Ninth Circuit to give the district court another chance to explain its bases for granting a new trial.

Aetna's petition for certiorari should be denied. Contrary to Aetna's claims, there is no inter-Circuit conflict on the standard for when a district court may substitute its judgment for that of the jury; the Ninth Circuit's denial of Aetna's request for a second trial did not violate due process; and the Ninth Circuit's decision to reverse the grant of a new trial, rather than to remand for additional explanation of the district court's grounds, did not depart from normal procedures, inasmuch as the record reviewed by the Ninth Circuit established no basis at all for granting a new trial. None of the issues raised by Aetna warrants attention by this Court.

STATEMENT OF THE CASE

Aetna's statement of the case presents many facts in the light most favorable to itself. In light of the jury verdict and the portions of the decisions below that Aetna does not challenge, Aetna's perspective is both legally erroneous and unhelpful to this Court. The opinion of the Ninth Circuit presents an accurate,

comprehensive statement of the facts surrounding Aetna's improper denial of Sherrie Ace's claim for long-term disability benefits. [App. 3a-10a]. The following paragraphs provide a short summary. None of the facts set forth in this section was disputed at trial.

A. Ace's Disability

Sherrie Ace was an employee of the State of Alaska. [App. 3a; 1 Tr. 170[1]]. Her job required rigorous travel in off-road vehicles in remote areas of the state. [App. 5a n.6; 1 Tr. 170-71; 4 Tr. 8-9]. As part of her employee benefits, Ace selected and paid monthly premiums for the maximum possible health and disability insurance. [App. 3a; 1 Tr. 174-76, 189-90; ER 22, 24].

In 1986, Ace broke her leg in an accident. [App. 3a; 1 Tr. 172-73]. She submitted her medical records and bills to Aetna, which paid them. [1 Tr. 189; 2 Tr. 94-95]. From the beginning, Ace's doctors made clear that she had suffered a particularly bad break that had shattered her knee; complete repair was impossible, and it was likely that Ace's knee would cause long term problems and could eventually require a total replacement. [App. 3a; 1 Tr. 173; ER 59-63, 65-69]. Between 1986 and 1992, Ace's knee deteriorated as predicted. Her doctors performed a series of surgeries, each of which provided only temporary relief. Ace regularly submitted her medical records and bills to Aetna. [App. 3a; 1 Tr. 178-82, 187; ER 78, 81, 148-49, 153-55].

By early 1992, Ace's leg had become so extraordinarily painful that her orthopedic surgeon recommended an osteotomy, a procedure in which the knee bones would be re-broken and re-set in the hope of shifting her weight onto less damaged parts of her

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[1] For the convenience of this Court, citations to the trial court transcripts and the excerpt of record follow the same form as in the petition. "CR" is used to denote documents docketed in the district court file. This opposition includes citations to the record for every point relied on in the Ninth Circuit's opinion, to dispel any suggestion that the appellate court misread the record.

knee. [App. 3a & n.2; 1 Tr. 183-84, 187; ER 92-94, 156-59]. The osteotomy was performed in April, 1992. The surgeon issued Ace a four-month excuse from work to cover her anticipated recovery time. [App. 3a; ER 95-96, 104]. Under her Aetna policy, Ace was entitled to short-term disability benefits for up to four months, starting after she had been disabled for 30 days. Ace submitted an application for short-term disability benefits; Aetna concurred she was disabled and paid the benefits. [App. 3a; 1 Tr. 189-90; ER 20].

Unfortunately for Ace, the osteotomy was not successful. The pain in her leg increased, and Ace did not believe she was capable of returning to work even half-time. [App. 3a; 1 Tr. 188-91; ER 101].

B. Aetna's Wrongful Denial Of Ace's Disability Claim

Ace contacted Aetna and obtained an application for long-term disability benefits. She submitted her application in October, 1992, along with the required Attending Physician's Statement, on which her doctor explained that she suffered from "severe degenerative joint disease" and experienced "frequent swelling" and "constant pain." He classified her on Aetna's form as between "Class III" and "Class IV" in terms of her disability, which the form characterized as capable of only light or sedentary work. [App. 4a; ER 55-56]. Ace's supervisor had earlier provided Aetna with a detailed job description indicating that her regular duties included travel that could not be considered "light" or "sedentary" work, since she was required to inspect properties in rural Alaska that could only be visited by riding small planes and "three-wheelers," the all-terrain vehicles used in isolated locations without maintained roads. [App. 5a & n.6; 4 Tr. 8-9, 11-13; ER 111, 113-14].

Ace called Aetna several times to check on the status of her claim. Aetna's records indicated that she advised that she had no money and urgently needed her claim approved. [App. 4a; ER 122-23].

Aetna denied Ace's long-term disability claim on November 17, 1992. The denial letter stated in part, "In order to be eligible for Long-term Disability Benefits, you must be totally disabled to the extent that you are unable to work at any gainful occupation due to bodily injury or illness." The letter also stated that Aetna considered her job duties sedentary. [App. 4a-5a; ER 57-58]. Aetna conducted no investigation before denying the claim, although a reasonable investigation is required under Alaska law. *See* Alaska Stat. 21.36.125(3); 3 Alaska Admin. Code § 26.050(a). At trial, Aetna conceded that no one from Aetna ever contacted Ace, her doctors, or her supervisor in order to clarify either her medical condition or the requirements of her employment. [App. 5a; 3 Tr. 121; 7 Tr. 6; ER 139-40, 162].

The key phrase in the denial letter -- "unable to work at any gainful occupation" -- is taken from Aetna's policy. However, Aetna conceded at trial that legally it could not deny benefits based on that standard.[2] [App. 5a-6a; 7 Tr. 11; ER 22]. Aetna contended it applied a different standard, but at trial Aetna's employees could not state consistently what standard they allegedly did apply, and they agreed they never advised Ace what other standard she had to meet to qualify for long-term disability benefits. [App. 5a-6a; 3 Tr. 18-19, 47-51, 90-91, 93]. Indeed, Aetna's corporate policy required employees to quote policyholders only the language of the policy. [App. 6a & n.9; 3 Tr. 49-50, 64-65, 81-82; ER 120].

Ace requested reconsideration of her claim. She provided Aetna with a long letter from her doctor, dated November 30, which explained that her condition had continued to deteriorate and

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[2] Courts have long held that the "unable to work at any gainful occupation" language may not be applied literally, because of the unfair and absurd results this would allow, such as denying disability benefits to a physician who could no longer perform his job duties but who could work as a custodian or sales clerk. *See, e.g., Aetna Life Ins. Co. v. Orr,* 169 S.W.2d 651, 654 (Ark. 1943); *Lorba v. Aetna Life Ins. Co.,* 207 So. 2d 305, 308-09 (Fla. App.), *cert. denied,* 212 So. 2d 876 (Fla. 1968).

that he now considered her to have a "Class V" disability, which Aetna defined as "[s]evere limitation of functional capacity; incapable of minimal (sedentary) activity." [App. 6a-7a; 1 Tr. 211-12; ER 50, 53-54]. Aetna again denied the claim. Its letter to Ace stated that she had provided "no objective medical evidence" to support her disability claim. [App. 7a; ER 48]. Aetna's employees and expert later conceded that Ace *had* supplied objective medical evidence; further, they agreed that objective medical evidence is neither defined nor required under Ace's policy and that a claims handler is required to consider all available evidence, including subjective complaints of pain. [App. 7a & n.11; 3 Tr. 68-69, 80-81; 6 Tr. 27; ER 120].

Ace requested reconsideration a second time. In February, 1993, she provided Aetna with a detailed letter from her doctor, explaining that she could not walk or sit for any length of time and reiterating that she should be considered "Class V" disabled (incapable of even sedentary employment). [App. 9a; ER 41-42, 44-45]. Ace also provided a recent evaluation from a physical therapist who determined, based on specific test results, that Ace was capable of sitting, standing, or walking for less than an hour each during the day; this physical capacities evaluation revealed that Ace was in *worse* physical condition in January than when the same tests were conducted by the same therapist six months earlier. [App. 9a; ER 43, 97]. A cover letter from a friend advised that Ace was in "fragile physical condition" and "emotionally and economically fragile as well," because of living with chronic pain aggravated by the frustration of dealing with Aetna. [App. 9a; ER 37-38]. Because she had no income, Ace was forced to sell much of her personal property and her home; she sent her son to live with another family and she lived in her car during six harsh weeks of Alaska's winter, washing herself in a gas station restroom. [App. 9a; 1 Tr. 222-27; 2 Tr. 16-20]. Aetna refused to reverse its denial of benefits. [App. 9a-10a; 3 Tr. 163; 6 Tr. 32; ER 30-31].

In April, 1993, in accordance with the recommendation of her doctors, who had wanted to give her knee a full year to recover from the trauma of the osteotomy, Ace underwent another surgery. [App. 10a; 2 Tr. 30]. This operation proved successful and Ace

was able to return to work, albeit with a limp and some pain, by June 1, 1993. [App. 10a; 2 Tr. 31].

C. District Court Proceedings

In 1994, Ace filed a lawsuit in Alaska state court. [ER 1-4]. Aetna removed the case to federal court on diversity grounds. [CR 1]. The case was tried to a jury in May, 1996. At trial, Aetna was far from contrite about its treatment of Ace. Instead, Aetna persisted in denying that Ace was entitled to any long-term disability benefits, blamed Ace for any difficulties she had experienced, and proudly maintained that it had handled Ace's claim properly and in accordance with corporate policies and procedures. Aetna contended that, if it erred in denying Ace's application, the error was at most negligent and not in bad faith; and, if there was bad faith, it was not malicious or with reckless indifference to Ace's interests, so no punitive damages should be awarded. [6 Tr. 187-220].

The jury rejected all of Aetna's claims. Jurors found that Ace was entitled to long-term disability benefits for nine months (from September, 1992, through May, 1993); that Aetna denied Ace's claim in bad faith; and that there was clear and convincing evidence that Aetna acted with malice, bad motives, or reckless indifference to Ace's interests, justifying punitive as well as compensatory damages under Alaska law. [App. 2a; ER 163-64].

Applying proper deference to the jury as factfinder, the district court denied Aetna's post-trial motion for judgment as a matter of law or a new trial on the bad faith claim. [App. 49a-50a, 58a-59a]. However, in reviewing the verdict on punitive damages, the district court failed to view the evidence in the record in its entirety and in the light most favorable to Ace; thus, the district court erroneously set aside the jury's determination and granted judgment as a matter of law to Aetna on the question of whether its conduct warranted punitive damages. [App. 59a-62a]. The district court also granted Aetna's subsequent conditional motion for a new trial on this issue. [App. 49a]. The district court did not reach

Aetna's alternative motion for a remittitur or a new trial on the amount of punitive damages. [App. 2a n.1].

D. The Court Of Appeals Decision

The Ninth Circuit affirmed the district court's rulings with respect to the bad faith claim and reversed the district court's rulings with respect to punitive damages. [App. 20a-21a]. The panel determined unanimously that the district court erred in not viewing the evidence in the light most favorable to Ace and in thereby granting judgment as a matter of law to Aetna on the question whether its conduct could be considered "outrageous" and in "reckless indifference to the interests of another." [App. 10a-13a]. The appeals court listed eight different ways in which the jury could find by clear and convincing evidence that Aetna's conduct warranted punitive damages under Alaska law:

> (1) basing denial of the claim on an illegal standard for benefit eligibility; (2) failing to inform the claimant of the standard actually used by Aetna in evaluating disability claims; (3) failing to investigate the claim and to seek or request the supporting information alleged to be missing; (4) failing to assist the claimant in presenting her disability claim; (5) relying on outdated prognoses of the claimant's expected recovery and disregarding recent reports of her actual condition; (6) denying her claim based on an undefined "requirement" not a term of her policy and contrary to Aetna's internal claim adjustment guidelines; (7) falsely advising the claimant that Aetna had no claim adjustment guidelines; and (8) making a last-minute demand for an IME [independent medical evaluation] after having denied the claim.

[App. 12a-13a (footnotes omitted[3])].

Aetna does not now contest the Ninth Circuit's ruling reversing the district court's improper grant of judgment as a matter of law.

The Ninth Circuit also reversed the district court's conditional grant of a new trial on liability for punitive damages. [App. 14a-15a]. The appellate opinion correctly characterized much of the evidence concerning Aetna's bad faith and liability for punitive damages as undisputed, since the direct evidence of Aetna's claim handling was established by its claim file, the contents of which were undeniable. [App. 12a; ER 28-112]. Indeed, at trial Aetna's representatives endorsed the manner in which the claim was handled, saying that its adjusters processed Ace's claim in complete accordance with company policy. [*See, e.g.*, 3 Tr. 31, 50; 4 Tr. 138; ER 120]. The Ninth Circuit found no legal basis for ordering a new trial; it noted that the district court had not issued a detailed opinion but had stated simply that "[i]n general" it accepted Aetna's arguments for a new trial, which did little other than repeat the claim that the verdict was unsupported by any evidence. [App. 14a; *see* App. 49a; CR 228, at 6-9]. Accordingly, the Ninth Circuit held that the district court abused its discretion in granting a new trial on Aetna's punitive damages liability. [App. 14a-15a].

The appellate court briefly addressed the amount of punitive damages, although the district court had never reached this issue. The appeals court concluded that the award was excessive under Alaska law and remanded the case to the district court with instructions to determine the appropriate remittitur. [App. 15a-

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[3] The footnotes to the court's opinion refer to Alaska statutes and administrative rules establishing fair claim handling procedures, which Aetna violated when evaluating Ace's claim. [App. 12a-13a nn.18-19, citing Alaska Stat. 21.36.125(1), (14); 3 Alaska Admin. Code § 26.040(a)(3)].

16a]. Further proceedings in the district court concerning the allowable amount of the punitive award are pending. [CR 266].

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARD FOR SETTING ASIDE A JURY VERDICT BASED ON LEGALLY SUFFICIENT EVIDENCE.

A. FRCP 50(c)(1) Explicitly Provides For Appellate Review Of An Order Conditionally Granting A New Trial.

Aetna opens its petition by asserting that it is "questionable whether conditional new-trial orders based on the 'weight' of the evidence are reviewable at all." Pet. 14-15. Aetna is wrong.

Aetna's attempt to create an interesting question of federal civil procedure relies solely on language in a 58-year-old case, which predated the adoption of FRCP 50(c)(1).[4] Aetna disregards the clear language of the federal rule, the clear language of the Advisory Note explaining the rule, this Court's comments on Rule 50, and commentary by respected treatise writers explaining why a rule allowing appellate review makes good sense. Even Aetna concedes that no Circuit now holds that a conditional new trial order under Rule 50(c) is unreviewable. Pet. 15.

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[4] Further, Aetna did not argue below that appellate review was improper. This Court ordinarily will not grant certiorari on issues not raised and fully briefed in the lower courts. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 388 n.* (1990); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989).

Federal Civil Rule 50(c)(1) expressly authorizes appellate review of a conditional new trial order. The rule states that, if the appellate court reverses an order granting judgment as a matter of law, the appellate court shall determine whether or not a new trial should be held:

> In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed *unless the appellate court has otherwise ordered.*

FRCP 50(c)(1) (emphasis added).

The Advisory Committee Note to the 1963 Amendment to FRCP 50, which added subdivision (c), also makes clear that the rule contemplates appellate review of a conditional new trial order. The Note describes the precise situation that occurred in this case:

> And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict.

This Court, considering the then-new provisions in Rule 50, observed that Rule 50(c) explicitly provides "that the appellate court will review on appeal both the grant of judgment *n.o.v.* and, if necessary, the trial court's conditional disposition of the motion for new trial." *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 323 (1967).

Older cases, which occasionally assumed that a conditional new trial order was not reviewable, based that erroneous view on an overbroad interpretation of this Court's early cases. Professors Wright, Miller, and Kane thoughtfully distinguish the sometimes problematic review and reversal of an order *denying* a new trial (when an appellate court substitutes its view of the facts for those of the jury and the trial judge) from the situation in the current case where the appellate court reviews and reverses an order *granting* a new trial (when the appellate court reinstates the jury's verdict):

> Review of an order granting a new trial because the verdict is against the weight of the evidence is a different matter. The older cases did not perceive the difference and often said that neither the grant nor denial was reviewable. There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial. In this instance the appellate court is not reexamining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it.

11 Charles A. Wright, Arthur R. Miller, & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE § 2819, at 205 (2d ed. 1995) (footnotes omitted).

Appellate review of a conditional new trial order is important to protect the right to a jury trial from infringement by a district court too eager to substitute its views for the jury's. Aetna's attempt to persuade this Court to grant certiorari because there is something wrong or controversial about appellate review must fail.

B. All Circuits Preclude A District Court From Casually Substituting Its View Of The Facts For The Jury's Verdict.

Aetna devotes the bulk of its petition to a claim that certiorari should be granted to resolve an alleged conflict in the Circuits concerning when a district court may set aside a jury verdict on the ground that the verdict is against the weight of the evidence. Pet. 12-13, 15-19. This argument has no merit.

There is no inter-Circuit conflict. Every Circuit agrees that the district court may not lightly substitute its view of the facts for the jury's verdict. Although different decisions use slightly

different words, recent decisions from every Circuit articulate the principle that the district court may not casually set aside a jury verdict because it views evidence in a different manner than the jury did. Accordingly, all Circuits apply a stringent standard and hold that a new trial should not be granted due to perceived weakness in the proof unless the verdict is seriously erroneous, a miscarriage of justice, or against the clear or great weight of the evidence:

> *Bogosian v. Mercedes-Benz*, 104 F.3d 472, 482 (1st Cir. 1997): "A new trial is warranted only if the verdict, though rationally based on the evidence, was so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice." (internal quotes omitted)
>
> *Atkins v. New York City*, 143 F.3d 100, 102 (2d Cir. 1998): "A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." (internal quotes omitted)
>
> *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1076 (3d Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 2532 (1997): "[A] district court should grant a new trial on the basis that the verdict was contrary to the weight of the evidence only where a miscarriage of justice would result if the verdict were to stand." (internal quotes omitted)
>
> *Atlas Food Systems & Services, Inc. v. Crane National Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996): "[I]t is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that [1] the verdict is against the clear weight of the evidence, or [2] is based upon evidence which is false, or [3] will result in a miscarriage of justice . . . ." (internal quotes omitted)

Pryor v. Trane Co., 138 F.3d 1024, 1026 (5th Cir. 1998): "A trial court should not grant a new trial on evidentiary grounds unless the verdict is against the great weight of the evidence." (internal quotes omitted)

Strickland v. Owens Corning, 142 F.3d 353, 357 (6th Cir. 1998): "[A] new trial is warranted when a jury has reached a seriously erroneous result as evidenced by . . . the verdict being against the weight of the evidence." The same paragraph explains that this means the judge may set aside the verdict if it is "against the clear weight of the evidence." (internal quotes omitted)

Miksis v. Howard, 106 F.3d 754, 757 (7th Cir. 1997): "A new trial may be granted if the verdict is against the clear weight of the evidence . . . ."[5]

Mears v. Nationwide Mutual Insurance Co., 91 F.3d 1118, 1123 (8th Cir. 1996): "The district court may order a new trial where it is convinced that the verdict goes against the clear weight of the evidence . . . ."

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[5] It is clear that the Seventh Circuit panel that decided *Miksis* did not see itself as applying a standard different from the standard in *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997), the case that Aetna cites as supposedly signaling a departure in the Seventh Circuit's standard of review of new trial orders. Pet. 18. The same Circuit Judge, Eschbach, authored both opinions. Further, *Medcom*, although issued for publication approximately a week after *Miksis*, was circulated to all active judges in the Seventh Circuit before its publication. 106 F.3d at 1397 n.3. At least one subsequent decision has cited both *Medcom* and *Miksis* without suggesting that the cases conflict. *Hulbert v. Wilhelm*, 120 F.3d 648, 656 (7th Cir. 1997).

Ace v. Aetna Life Insurance Co., 139 F.3d 1241, 1248 (9th Cir. 1998) [App. 14a]: "A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result." (internal quotes omitted)

York v. American Telephone & Telegraph Co., 95 F.3d 948, 958 (10th Cir. 1996): "Where a party moves for a new trial on the ground that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly or overwhelmingly against the weight of the evidence." (internal quotes omitted)

Carter v. DecisionOne Corp., 122 F.3d 997, 1004 (11th Cir. 1997): "A motion for new trial may only be granted when the jury's verdict is against the great weight of the evidence."

McNeal v. Hi-Lo Powered Scaffolding, Inc., 836 F.2d 637, 646-47 (D.C. Cir. 1988): "If . . . a new trial is granted on the ground that the verdict was against the weight of the evidence, the [trial] judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial." (internal quotes omitted)[6]

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[6] *See also Thompson v. International Association of Machinists*, 614 F. Supp. 1002, 1013 (D.D.C. 1985) ("Out of (continued...)

> *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1028 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 951 (1997): "[A] trial court must review the record to determine whether the jury's verdict contravenes the clear or great weight of the evidence." (internal quotes omitted)

The supposedly conflicting authority that Aetna cites in an effort to manufacture an inter-Circuit conflict reflects nothing more than the different verbal formulations that courts often use to express the same fundamental concept. Indeed, the same opinion, even the same paragraph, may use both phrases "against the weight of the evidence" and "against the clear weight of the evidence." *E.g.*, *Strickland v. Owens Corning*, 142 F.3d at 357; *Atlas Food Systems & Services, Inc. v. Crane National Vendors, Inc.*, 99 F.3d at 594. After surveying the slightly different language employed by various courts, one leading treatise on federal civil procedure states, "It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions of the type now being considered." 11 FEDERAL PRACTICE AND PROCEDURE, *supra*, § 2806, at 74.

Another well-regarded treatise on federal civil procedure observes that, regardless of the language used, it is the practice of appellate courts to review extra carefully any order by a district court setting aside a verdict on the ground that it is against the weight of the evidence:

> [B]ecause of the danger of having a judge substitute his or her judgment for that of the jury, appellate

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[6] (...continued)
respect for the function of the jury as the trier of fact, an allegation on a motion for new trial that the verdict is against the weight of the evidence will generally be rejected unless it is quite clear that the jury has reached a seriously erroneous result, and the district judge finds the verdict contrary to the great weight or clear weight of the evidence.") (internal quotes and citations omitted).

> courts exercise a greater degree of scrutiny to the grant of a new trial . . . . The broad discretion afforded to the trial court is tempered by the deference due to a jury. The appellate court must ensure that the evaluation of the credibility of witness testimony remains the sole domain of the jury.

12 James W. Moore, MOORE'S FEDERAL PRACTICE, § 59.54[4][a], at 59-131 (3d ed. 1997). The most recent edition notes no conflict among the Circuits.

This deferential view, respecting the authority of the jury to determine the facts, derives from long-established principles enunciated by this Court. More than half a century ago, in *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944), this Court wrote:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

See also Browning-Ferris Industries, 492 U.S. at 278 (reiterating that it is not the role of the court to substitute its judgment for that of the jury).

In short, there is no conflict among the Circuits concerning the appellate courts' duty to ensure that district court judges respect the function of the jury as the primary factfinder. Aetna's petition for certiorari, based on an invented conflict, should be denied.

C. *Gasperini* Did Not Modify The Applicable Standard of Review.

Aetna suggests that *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), modified the standard that appellate courts should use in reviewing orders granting new trials. Pet. 17-19.

Aetna did not present this argument to the Ninth Circuit, either in its original briefing or in its petition for rehearing and suggestion for rehearing en banc. This Court should not grant certiorari to review an issue that has not been fully litigated in the lower courts. *See, supra,* at __ n.__.

Moreover, Aetna's heavy reliance on *Gasperini* is misplaced. *Gasperini* has little relevance to this case. *Gasperini* did not address the issue on which Aetna seeks review: the standard for appellate review of an order granting a new trial based on the district court's belief that the verdict on liability for punitive damages was against the weight of the evidence. *Gasperini* dealt exclusively with judicial review of the *amount* of damages, an area where some courts previously believed no appellate review was allowed at all. 518 U.S. at 434; MOORE'S FEDERAL PRACTICE, *supra,* § 59.54[4][b][i], at 59-132.[7] The central holding in

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[7] Likewise, with only one exception, the cases that Aetna cites to suggest a change in the law or a conflict among the Circuits all deal with appellate review of a new trial order based on the *amount* of the verdict, rather than with a new trial based on the district court's disagreement with the jury verdict on liability. *See Kirsch v. Fleet Street, Ltd.*, __ F.3d __, 1998 WL 334714, at **12-14 (2d Cir. June 25, 1998) (affirming a remittitur on the amount of compensatory damages); *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 355-56 (1st Cir. 1998) (affirming district court decision not to grant remittitur or new trial on amount of damages); *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d at 1397 (reversing district court order granting a new trial on amount

(continued...)

Gasperini is that "'The proper role of the trial and appellate courts in the federal system in reviewing *the size of jury verdicts* is . . . a matter of federal law.'" 518 U.S. at 437, quoting *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (italics added).

In authorizing judicial review of the amount of a verdict in order to determine whether it is excessive, *Gasperini* in no way undermined or overruled *Tennant* or *Browning-Ferris* or any of the myriad other cases by this Court that emphasize the limited authority of the district court to substitute its view of the facts for the verdict found by a properly instructed jury. Aetna's suggestion that *Gasperini* changed the law on reviewing jury verdicts on punitive liability is mistaken and is not a basis for granting certiorari.

D. Aetna's Petition Asks This Court To Re-Evaluate The Facts And Presents No Legal Issue Of Nationwide Importance.

1. The appeals court applied the correct legal standard in reviewing an order entered with minimal explanation or analysis.

The Ninth Circuit, like every other Circuit, reviews a district court order granting or denying a partial new trial using the abuse-of-discretion standard. The panel applied that standard in this case. [App. 14a]. The Ninth Circuit en banc saw no error in the application of that standard warranting full Circuit review.

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[7] (...continued)
of damages).

The exception is *Santa Maria v. Metro-North Commuter Railroad*, 81 F.3d 265, 273-75 (2d Cir. 1996), in which the appellate court reversed the district court order denying a new trial on all issues; however, the weight of the evidence was not an issue in the new trial ruling, so Aetna's cite to this case relies on dictum.

Aetna maintains that the Ninth Circuit panel paid lip service to the proper standard but actually exercised a more intrusive scrutiny. Pet. 19-24. There is no basis for this claim. The Ninth Circuit applied the standard it said it applied. What Aetna really argues is that the jury and the Ninth Circuit should have accepted Aetna's view of the facts. This claim is also meritless. This Court has no reason to grant certiorari to review the facts yet again.

An appellate court's determination that the district court abused its discretion in substituting its view of the facts for that of the jury is an unremarkable holding. Cases from around the country reverse orders granting a new trial because the appeals court concludes that the district court abused its discretion in finding the verdict against the clear weight of the evidence.[8] This Court, too, has made clear that an appellate court, applying the abuse-of-discretion standard properly, should reverse when the district court makes a discretionary ruling based on a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling . . . on a clearly erroneous assessment of the evidence."); *see also Gasperini*, 518 U.S. at 435 ("We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit . . . ."). Even Aetna concedes that the abuse-of-discretion standard does not require the appellate court to rubberstamp every discretionary decision by the district court. Pet. 20.

Aetna contends that "[w]here the district court makes a reasoned decision about the quantity and quality of the evidence supporting a verdict and decides a new trial is appropriate, the court of appeals should defer to the trial judge's assessment of the

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[8] *E.g.*, *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 201-02 (2d Cir. 1995); *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1353-54 (3d Cir. 1991); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523-26 (6th Cir. 1990); *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1497-98 (11th Cir. 1987).

evidence . . . ." Pet. 20-21. Aetna is correct in the abstract, but the abstract does not reflect the reality of this case.

The district court in the current case offered no carefully reasoned decision supporting a new trial. In granting a new trial on the question of liability for punitive damages, the district court wrote only that "[i]n general" it agreed with Aetna's arguments for a new trial. [App. 49a]. Those arguments emphasized Aetna's and the district court's belief that the evidence did not support the punitive damages verdict. [CR 228 at 5[9]]. Neither Aetna nor the district court ever articulated an analysis of the evidence in this case that would allow a finding that the verdict on punitive damages was supported by clear and convincing evidence (as it must be under Alaska law to survive a motion for directed verdict or judgment as a matter of law), but was against the great weight of the evidence (so as to justify ordering a new trial). In fact, the district court made no explicit finding that the verdict was against the weight -- much less against the clear or great weight -- of the evidence, and the Ninth Circuit, based on its own thoughtful review of the record, concluded that the record could not support such a finding. [App. 15a]. In this case, the Ninth Circuit reversed the judgment as a matter of law based on its determination that the district court had "ignored significant and undisputed evidence" and failed to consider the evidence as a whole; this determination also strongly supported the appeals court's companion conclusion that the new trial order -- which rested on the same reasoning as the judgment as a matter of law -- was legally erroneous. [App. 13a-15a].

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[9] Aetna's memorandum in support of the new trial motion incorporated its memorandum in support of the motion for judgment as a matter of law *and* the district court's order granting that motion. Aetna wrote: "For the reasons set forth in this Court's July 2 Order [App. 51a-62a] and in Aetna's Rule 50 motion (Aetna JMOL Mem. 8-44), the jury's verdict on punitive liability under Alaska law is -- at the very least -- against the weight of the evidence." [CR 228 at 5 (internal quotes omitted)].

2. The question whether a district court abused its discretion in granting a new trial on weight-of-evidence grounds is an intensely fact specific inquiry.

The question whether a district court abused its discretion in granting a conditional new trial is intensely factbound, as is evident from any opinion evaluating an order granting or denying a new trial on weight-of-the-evidence grounds. In the present case, to determine whether the district court erred, the Ninth Circuit was obliged to review the complete trial transcript and hundreds of pages of exhibits, including medical records and claim files, all of which is summarized in the lengthy fact section of the appellate opinion. [App. 3a-10a]. Based on this detailed review, the Ninth Circuit determined that the record amply supported the jury verdicts both on bad faith and liability for punitive damages and failed to support a grant of judgment as a matter of law or a new trial. [App. 3a-13a, 17a-18a].

Aetna's petition suggests the complex factual review that would be required by this Court if certiorari were granted. Reviewing Aetna's arguments would require this Court to determine the quantity and quality of evidence supporting the jury's determination that Aetna acted outrageously in handling Ace's disability claim. Only with a full understanding of all the facts could this Court decide whether the Court of Appeals erred in holding that the district court erred in concluding that the verdict was unsupported by the evidence.

Aetna challenges two of the eight bases the appeals court listed for finding Aetna's conduct outrageous. Pet. 22-24. In reality, these arguments challenge the Court of Appeals' determination concerning the motion for judgment as a matter of law, a holding that Aetna does not ask this Court to review. Aetna does not tie its arguments to reasons why the Court of Appeals allegedly erred with regard to the ruling on the new trial.

In any event, Aetna's claims that the Court of Appeals committed reversible error are unfounded. Aetna argues, for its

first example, that the Ninth Circuit should have deferred to the district court's finding that Aetna used a legal standard in denying Ace's benefits. Pet. 22-23. However, the appellate court properly could find that the district court erred in disregarding Aetna's correspondence to Ace (which cited *only* the *illegal* standard) [ER 30-31, 48, 57], and in disregarding the fact that the jury did not have to accept Aetna's witnesses' self-serving testimony about the standard they claimed they applied. [*See, e.g.*, 3 Tr. 18-20, 47-50; 6 Tr. 8-9]. Furthermore, no new trial would be warranted even if Aetna used the legal standard, because the verdict is amply supported by the seven other ways in which Aetna's claim handling practices manifested reckless indifference to Ace's interests.

Aetna's second example contends that the district court appropriately found that the claim handler acted reasonably in determining that Ace's job was sedentary. Pet. 23-24. However, again the appellate court properly could find that the district court erred in disregarding evidence presented to the jury; unquestionably, Aetna's claim file included the detailed job description that showed that Ace's job required rigorous, non-sedentary travel. [ER 111, 113-14]. Moreover, Aetna does not explain how Ace's disability claim properly could have been denied after her doctor and physical therapist reported she was unable to perform even sedentary jobs. [ER 41-45, 53-54].

Much testimony and extensive briefing were devoted to these specific factual issues. The factual disputes that Aetna asks this Court to review were entrusted to the jury to decide. The jury resolved the disputes in Ace's favor. The district court reassessed the facts, and the appellate court thoughtfully reviewed the record and determined that the district court abused its discretion in substituting its view for the jury's. A full factual review by this Court would establish that the appellate court, and not the district court, was correct in how it evaluated the record on each point raised by Aetna, but deciding where the weight of the evidence lies involves no legal matter of national significance that justifies this Court's review of this case.

II. THIS CASE DOES NOT IMPLICATE THE DUE PROCESS CONCERNS RAISED IN CASES INVOLVING POST-VERDICT JUDICIAL REVIEW OF THE AMOUNT OF PUNITIVE DAMAGES AWARDS.

Aetna's second asserted ground for granting certiorari is as spurious as its first. Aetna has tried to manufacture error where none exists by using cases concerning review of large punitive damages awards in a situation where the size of the award is not even an issue. Pet. 24-26.

This Court has developed a body of jurisprudence requiring meaningful and adequate judicial review of potentially excessive punitive damages awards. *See, e.g., BMW v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

All of those cases are inapposite to this case at this time. The *amount* of the punitive award is *not* an issue before this Court. The Ninth Circuit *accepted* Aetna's argument that the jury's punitive damages verdict was excessive and remanded the case to the district court to determine a remittitur. [App. 16a]. Arguments based on any alleged failure to provide post-verdict review consistent with due process must wait until the post-verdict review process has been completed. From Aetna's perspective, the requirement of thoughtful judicial review of potentially excessive punitive awards is working well: the law of this case is that the jury's award was excessive under Alaska law and a remittitur must be granted. [App. 16a]. No due process concerns about the adequacy of post-verdict review are implicated in this case at this time.

None of this Court's cases suggest that due process requires special review of a jury's factual determination that a defendant acted "with reckless indifference to the rights of another" or special

deference to a district court's contrary determination that punitive damages are not warranted, and Aetna's petition offers no rationale for extending the cases. Whether punitive damages are legally justified is a matter of state law; states utilize many different legal standards. In its petition to this Court, Aetna does not challenge the Ninth Circuit's holding that evidence in the record was legally sufficient to sustain the jury's finding that Aetna's conduct warranted imposing punitive damages under Alaska law. [App. 10a-13a]. Any argument for extending due process concerns to review of the verdict establishing punitive liability should await a case where the petitioner claims before this Court that there was an insufficient basis to award punitive damages against it.

III. THERE IS NO REQUIREMENT THAT AN APPELLATE COURT REMAND A CASE TO THE DISTRICT COURT FOR A STATEMENT OF ITS REASONS FOR GRANTING A NEW TRIAL WHERE THE DISTRICT COURT STATED THAT IT ACCEPTED THE REASONS OFFERED BY THE DEFENDANT AND NONE OF THOSE REASONS JUSTIFY A NEW TRIAL.

Aetna's final argument for granting certiorari begins with a misstatement of fact. Aetna asserts it offered the district court seven independent grounds for granting a new trial; it criticizes the Ninth Circuit for not explicitly considering each of these grounds before reversing the order granting a new trial. Pet. 27.

Aetna in fact offered the district court just three arguments for granting a new trial on the issue of Aetna's liability for punitive damages. *See* Pet. 9.[10] Aetna's primary argument for a new trial

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[10] Aetna counts seven arguments by including those that it offered to the district court in support of its motion for a new trial on the *amount* of punitive damages. [CR 228]. While the Ninth Circuit did not address those arguments explicitly, it obviously accepted one or more of them, because it vacated the punitive

(continued...)

was that the verdict was against the weight of the evidence. The Ninth Circuit correctly concluded that this was the main reason relied on by the district court, and then expressly analyzed and rejected that basis for ordering a new trial. [App. 14a]. Thus, Aetna's argument to this Court reduces to a claim that the Ninth Circuit erred by not remanding to have the district court state explicitly the extent, if at all, to which it relied on Aetna's two subsidiary arguments when it granted a partial new trial.

The two grounds for a new trial that the Ninth Circuit did not explicitly address received only token attention before the lower courts. Aetna devoted a total of three pages to both arguments in its motion to the district court, then gave the same cursory attention to these arguments on appeal. [CR 228 at 6-9; Aetna's Brief as Appellee/Cross-Appellant at 43-46]. A remand to allow the district court to address these issues explicitly would have been pointless, since neither of the subsidiary grounds could support a new trial.

Contrary to Aetna's exaggerated claims, the Ninth Circuit's approach to Aetna's subsidiary arguments did not depart from established appellate procedure. There was no need for the Ninth Circuit to remand or to draft a more detailed opinion expressly addressing Aetna's minor arguments. Remanding is one option when the district court fails to offer adequate explicit grounds to justify a ruling, but it is not the only legitimate choice. An inflexible rule requiring an appeals court to remand whenever the district court issues a minimally explained and unsupported order would be inefficient and would ill serve the judiciary.[11]

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[10] (...continued)
damages award, exactly as Aetna requested. [App. 15a-16a]. Aetna has no basis for complaining to this Court about the Ninth Circuit's response to those arguments.

[11] A sampling of cases from around the country demonstrates that appellate courts often reach a final decision on a new trial question, even when the district court has not clearly (continued...)

In the current case, no remand was required, because the appellate court could determine from the record that the alternative grounds presented to the district court could not possibly support an order for a new trial, even if the trial court were persuaded by them.

Aetna's first alternative ground was a claim that a small portion of testimony by Ace's expert was unduly speculative. [CR 228 at 6-7]. The expert's testimony largely was devoted to explaining how Aetna acted in bad faith and breached its duties to Ace. [3 Tr. 198-99, 202-27]. That testimony was not speculative and Aetna lodged no objection to it. The only supposedly speculative testimony admitted over Aetna's objection was the expert's assertion that, if an insurer interprets a policy in a manner different from its literal language, the insurer should explain this to policyholders, because failure to do so can be confusing and

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[11] (...continued)
explained its bases for granting or denying a new trial. *See, e.g., Collazo-Santiago v. Toyota Motor Corp.*, __ F.3d __, 1998 WL 363856 at *5 n.6 (1st Cir. July 9, 1998) (reviewing record to determine whether new trial would be warranted on any ground asserted by defendant); *Frumkin v. Mayo Clinic,* 965 F.2d 620, 625 (8th Cir. 1992) (district court abuses its discretion if it grants a new trial but fails to "articulate an adequate statement of reasons when granting a new trial on weight of evidence grounds"; no remand to give the district court a second chance to explain its decision is required); *United States v. Tobias,* 899 F.2d 1375, 1381 (4th Cir. 1990) ("Because the district court has not adequately justified its conditional grant of a new trial, and we perceive no basis to justify it, the order granting a new trial is vacated."); *Powell v. Lititz Mutual Ins. Co.,* 419 F.2d 62, 65 (5th Cir. 1969) (review is "hampered," but not forbidden, when the district court offers no detailed explanation of a ruling granting a new trial). *See generally Baxter Healthcare Corp. v. Spectramed, Inc.,* 49 F.3d 1575, 1582 (Fed. Cir.) (appellate courts review judgments, not opinions; the appellate court is free to examine the record to determine whether the facts support the judgment), *cert. denied,* 516 U.S. 906 (1995).

misleading and may discourage a claimant from pursuing a valid claim.[12] This testimony is common sense. The jury on its own could reach the same conclusion without expert testimony. A ruling by the district court that the expert's "speculative" testimony warranted a new trial on liability for punitive damages would have been an abuse of discretion. *See, e.g., Mears v. Nationwide Mutual Ins. Co.*, 91 F.3d 1118, 1123-24 (8th Cir. 1996) (district court abused its discretion in granting a new trial based on "speculative" testimony where there was sufficient evidence to support the verdict without the "speculative" testimony); *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1353-54 (3d Cir. 1991) (similar). The Ninth Circuit's failure to remand for further analysis or to affirm the new trial order on this alternative ground was not error.

Aetna's second alternative ground for a new trial was a brief unobjected-to comment by Ace's counsel in closing argument. [CR 228 at 7-8]. Aetna's failure to object during the trial waived any claim of error. *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 619 (5th Cir. 1988); *Computer Systems Engineering, Inc. v. Qantel Corp.*, 740 F.2d 59, 69 (1st Cir. 1984); FEDERAL PRACTICE AND PROCEDURE, *supra*, § 2805, at 57-58 & n.13; § 2809, at 99 & n.4 (citing cases from many Circuits). Moreover, the comment was neither improper nor prejudicial. The alleged "misconduct" was a half-sentence that made passing mention of two products liability cases widely covered in the media. [6 Tr. 228]. A ruling by the district court granting a new trial based on

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[12] Ace's counsel asked the expert what a reasonable insurance executive would expect would result from a policy of quoting claimants only the language of the policy and not explaining how it is applied, if the practical application differs from the literal policy language. Over objection, the expert testified, "I would expect that claims would be abandoned, claims would be dropped, and the insured wouldn't know that there was another standard or that there was any other way that they could get their claim paid, so they'd probably give up." [3 Tr. 210-12; *see also* 3 Tr. 219-20 (repeating similar testimony].

"prejudicial misconduct" in the closing argument would have been an abuse of discretion.

The Ninth Circuit's failure to address explicitly either of Aetna's two weak alternative grounds for a new trial or to remand to allow the district court to rule explicitly on these grounds was not error, because neither ground would justify a new trial. This Court should decline Aetna's request to grant certiorari and to develop a new, inflexible rule always requiring an appeals court to remand for clarification when the district court does not explain whether or not it has relied on grounds that the appeals court can determine are meritless.

CONCLUSION

Aetna's petition for certiorari should be denied.

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No. 98-230

In the Supreme Court of the United States

OCTOBER TERM, 1998

AETNA LIFE INSURANCE COMPANY,

Petitioner,

v.

SHERRIE ACE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Ninth Circuit's Decision On The Legal Standard For New Trial Orders Conflicts With Decisions Of This Court And Other Circuits And Is Not Fact-Bound. 2

1. This Court's Decisions Emphasize the Scope of Trial Judges' Discretion to Grant New Trials. 3

2. The Ninth Circuit's Standard Conflicts With At Least the Seventh Circuit's. 5

3. The District Court Plainly Made a "Reasoned Analysis" of the Weight of the Evidence. 6

4. The Conflict Is Important. 8

B. This Case Presents The Court With An Opportunity To Clarify The Due Process Requirements For Post-Verdict Scrutiny of Punitive Liability Verdicts. 8

C. The Court Of Appeals Erred In Not Remanding The Case For Clarification Of The District Court's New Trial Order. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Page(s)**

BMW of North Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 8

Binder v. *Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995) 3

Gasperini v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996) . . . . . *passim*

Honda Motor Co. v. *Oberg*, 512 U.S. 415 (1994) 2, 8

Hulbert v. *Wilhelm*, 120 F.3d 648 (7th Cir. 1997) . . . 5

McClain v. *Owens-Corning Fiberglass Corp.*, 139 F.3d 1124 (7th Cir. 1998) 6

Medcom Holding Co. v. *Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1996) 1, 5-6

Miskis v. *Howard*, 106 F.3d 754 (7th Cir. 1997) 5

Neely v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967) 3

Tennant v. *Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944) 3-4

To-Am Equipment Co. v. *Mitsubishi Caterpillar Forklift America, Inc.*, ___ F.3d ___, 1998 U.S. App. LEXIS 18184 (7th Cir. Aug. 6, 1998) . . . 5-6

Rule:

Fed. R. Civ. P. 50 . . . . . 3, 9

REPLY BRIEF FOR PETITIONER

In attempting to avoid review of the important issues raised by this case, respondent disputes the applicability of this Court's controlling precedents, minimizes the inter-circuit conflict on the questions presented, and tries to mask the issues in a haze of fact-bound rhetoric. None of these tactics can withstand even minimal scrutiny.

The legal issues in this case are starkly presented and unburdened by factual nuance. The Ninth Circuit held unequivocally, in reversing the district court's new trial order, that:

> "'a stringent standard applies when the motion is based on insufficiency of the evidence.' * * * A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict 'is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result.'" App. 38a-39a (citations omitted).

This holding conflicts directly with *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 432-433 (1996), where the Court stated that "[t]he trial judge in the federal system, has discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence."

Moreover, the Ninth Circuit's holding conflicts directly with the decision in *Medcom Holding Co.* v. *Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1397 (7th Cir. 1996), which the Seventh Circuit has consistently followed. In that case the court recognized that the "trial judge in the federal system has discretion to grant a new trial if the verdict *appears against the weight of the evidence*" and added: "At one time we applied [the review] standard * * * more exacting[ly] when the district court granted a new trial because of the Seventh Amendment" but "in light of the Supreme Court's decision in *Gasperini* that an abuse of

discretion standard of review does not violate the Seventh Amendment * * * *we hereby abandon this practice* as unnecessary." *Ibid.* (emphases added).

The conflict on this important legal issue is not clouded by factual disputes that this Court would have to resolve. The district court reviewed the evidence at this modest trial in a written opinion. The Ninth Circuit reviewed the same evidence, applied its "stringent standard," and reached a different conclusion about whether Aetna was entitled to a new trial. Thus, this Court can resolve the principal legal issues presented solely on the basis of the written opinions of the courts below and decide whether the Ninth Circuit articulated and applied erroneous legal tests both for trial judges to use in deciding whether to grant a new trial and for appellate courts to use in reviewing new trial orders.

Review by this Court of these important issues is further compelled by the constitutional dimension of the case, which involves punitive damages liability. The Due Process Clause requires careful post-verdict scrutiny because "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 420, 423 (1994). The Court should encourage trial judges to conduct this searching review of punitive awards and require appellate courts to defer to their determinations that a punitive verdict is against the weight of the verdict.

A. The Ninth Circuit's Decision On The Legal Standard For New Trial Orders Conflicts With Decisions Of This Court And Other Circuits And Is Not Fact-Bound.

Respondent seeks to divert attention from the questions presented by raising a false question: whether an appellate court may "casually" or "lightly substitute its version of the facts for the jury's verdict" (Opp. 12). Aetna does not advocate that position. Aetna *does* object to the "stringent standard" applied by the Ninth Circuit in this case. Contrary

to respondent's argument (Opp. 13-16), not all of the circuits apply this standard and those that do are in conflict with decisions of this Court.

1. This Court's Decisions Emphasize the Scope of Trial Judges' Discretion to Grant New Trials. The Ninth Circuit's decision reversing the trial court's new trial order for Aetna applied a "stringent standard," under which it will not permit the trial court to exercise its discretion to grant a new trial based on the weakness of the evidence, unless the verdict is against the "great weight" of the evidence or is "seriously erroneous," and the court accords minimal deference to that determination. This legal standard, which as we demonstrated in the Petition (at 16-17) is also applied in some other circuits, clearly conflicts with decisions of this Court and of other circuits.[1]

Respondent cites this Court's decision in *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944), as supposedly supporting the proposition that appellate courts should "review extra carefully any order by a district court setting aside a verdict" (Opp. 16), and that "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable," 321 U.S. at 35. But that characterization

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[1] We noted in the Petition (at 14-15) that, as the Second Circuit held until recently, see *Binder* v. *Long Island Lighting Co.*, 57 F.3d 193, 201 (1995), it is questionable whether conditional new trial orders are reviewable at all despite the language of Rule 50(c). Respondent cites this Court's decision in *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), for the proposition that conditional new trial orders are reviewable (Opp. 11). But *Neely* did not involve application of Rule 50(c) to a conditional new trial order. Thus, the Court had no opportunity to address this question, as the subsequent conflict on the issue in the courts of appeals attests.

is misleading. In *Tennant* the Court was reviewing an order entering judgment notwithstanding the verdict (*ibid.*), which requires the trial judge to assume that every conflict in the evidence must be resolved in favor of the party who won the verdict. But this case involves a new trial order, which allows the trial judge to "weigh" the evidence to determine whether the verdict is consistent with the "fair weight" of the evidence. The Court's recent decision in *Gasperini* reaffirmed the breadth of the trial judge's discretion to order the case retried because the judge is not satisfied that the verdict is consistent with the weight of *all* the evidence.

Respondent objects that *Gasperini* is not relevant, arguing that the holding in that case is limited to judicial review of the *amount of damages* awarded to a plaintiff, but this case involves a new trial on *liability* (Opp. 18). But the Court's language in *Gasperini*, which is consistent with the Court's prior holdings (see Pet. 14 (citing cases)), is not so limited. According to *Gasperini*,

> "[t]he trial judge in the federal system, has *discretion* to grant a new trial if the verdict *appears* to [the judge] *to be against the weight of the evidence*. * * * This discretion *includes* overturning verdicts for excessiveness and ordering a new trial * * *." 518 U.S. at 432 (emphases added).

Thus, the broad discretion vested in trial judges and described in *Gasperini* "includes" setting aside excessive damages verdicts, but the power is not limited just to the amount of damages.[2]

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[2] Respondent erroneously states that Aetna did not call the *Gasperini* standard to the attention of the court of appeals (Opp. 18). In fact, Aetna cited to (and quoted extensively from) the governing standard articulated by this Court in *Gasperini* in its Opening Brief (at 38-41), Reply Brief (at 18), and Petition for

(continued...)

Moreover, the decision in *Gasperini* removed any lingering Seventh Amendment concerns about allowing a trial court to exercise the full measure of its discretion to grant a new trial based on the weight of the evidence (518 U.S. at 432). This decision thus eliminated the constitutional basis for the many prior (and erroneous) decisions of the courts of appeals applying a "stringent standard" of review to new trial motions (see Pet. 16-17).

2. The Ninth Circuit's Standard Conflicts With At Least the Seventh Circuit's. In the wake of *Gasperini* the Seventh Circuit has expressly rejected its "more exacting" standard, see *Medcom Holding*, 106 F.3d at 1397, and now applies ordinary abuse-of-discretion review to new trial orders, which may be entered when "the verdict appears against the weight of the evidence." Respondent tries to minimize this clear conflict in the circuits by citing (Opp. 14) a *prior* opinion of the Seventh Circuit, which did not consider the issue or even cite *Gasperini*. See *Miskis* v. *Howard*, 106 F.3d 754, 757 (7th Cir. 1997). Moreover, even this prior decision noted that the Seventh Circuit in reviewing new trial orders "defer[s] to the district court because of its unique position to view the evidence and the course of the trial." *Ibid.*

Underscoring the Seventh Circuit's new approach, that court has repeatedly reaffirmed its decision in *Medcom Holding*, reiterating that a trial court has "wide discretion" in deciding a motion for a new trial. *Hulbert* v. *Wilhelm*, 120 F.3d 648, 656 (1997); see *To-Am Equipment Co.* v. *Mitsubishi Caterpillar Forklift America, Inc.*, ___ F.3d ___,

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[2] (...continued)
Rehearing and Suggestion for Rehearing *En Banc* (at 12) in the Ninth Circuit. This issue was more than adequately preserved for review by this Court.

1998 WL 452341 (7th Cir. Aug. 6, 1998) (review of new trial orders "is for abuse of discretion only").

Thus, for example, the Seventh Circuit recently *upheld* the trial judge's grant of a new trial because the verdict in a wrongful death suit was against the weight of the evidence. Citing both *Gasperini* and its own decision in *Medcom Holding*, the Seventh Circuit applied the "abuse of discretion" standard of review, explaining that "an abuse of discretion only occurs when no reasonable person could take the view adopted by the trial court" and that, in making that inquiry, the reviewing court "must give the benefit of every doubt to the judgment of the trial judge." *McClain* v. *Owens-Corning Fiberglass Corp.*, 139 F.3d 1124, 1126, 1128 (7th Cir. 1998) (citations omitted).

Thus, there is a clear split in the circuits on the legal standard governing new trial motions. The other decisions cited by respondent (Opp. 13-16), which do not reconsider the issue in light of *Gasperini*, merely add to the confusion among the circuits, as we described in the Petition (at 16-21). Respondent tries to denigrate the importance of the disarray, dismissing the varying legal standards as merely using "slightly different words" (Opp. 12-13). But "slightly different" formulations of a legal standard can have real consequences for litigants, as this case demonstrates (see Pet. 22-24; page 7, *infra*).

3. The District Court Plainly Made a "Reasoned Analysis" of the Weight of the Evidence. Respondent concedes that "'[w]here the district court makes a reasoned decision about the quantity and quality of the evidence supporting a verdict and decides a new trial is appropriate, the court of appeals should defer to the trial judge's assessment of the evidence'" (Opp. 20-21 (quoting Pet. 20-21)). The Ninth Circuit, however, did not apply this standard. Instead, it expressly applied a more "stringent standard" of

review and substituted its view of the weight of the evidence for the front-line trial judge's better-informed evaluation.

Respondent nonetheless contends that review by this Court is neither necessary nor appropriate because the district court did not offer a "carefully reasoned decision supporting a new trial" and that, in any event, the question whether the district court abused its discretion is "intensely fact specific" (Opp. 21-22). Neither argument is a plausible barrier to review.

The argument that the district court did not make a reasoned decision reviewing the evidence in granting Aetna's new trial motion simply ignores the extensive opinion the trial judge issued (Pet. App. 51a-63a). The judge addressed and resolved against respondent many of the factual issues that she now maintains were "undisputed" in her favor. For example, the district judge reviewed the evidence and, after an extensive discussion, concluded that, contrary to respondent's argument (see Opp. 5), Aetna did *not* apply an "illegal standard" to "deny benefits to Ace." Pet. App. 60a.

Thus, the district court's extensive opinion detailing the factual basis for its holding is all that is necessary to resolve the legal issue presented by this case: the appropriate legal standard governing the grant and review of new trial orders. There is no need for this Court to engage in any independent factual analysis. The issue to be resolved is whether the Ninth Circuit applied the proper legal standards to the factual analysis and conclusions of the district court.[3]

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[3] Indeed, it is for this very reason that Aetna is not seeking certiorari to review the Ninth Circuit's reversal of the district court's judgment as a matter of law for Aetna on respondent's claim for punitive damages (App. 37a). This is not a concession by Aetna on the merits, as respondent suggests (Opp. 2), but rather a recognition that the Ninth Circuit's decision on that issue

(continued...)

4. The Conflict Is Important. In this case, the Ninth Circuit applied a legal standard that differs fundamentally from the standard the Seventh Circuit would have applied. The result was to deny Aetna a new trial that would have been sustained, if this case had arisen in the Seventh Circuit. It is fundamental to the rule of law in the federal system that correct and intelligible legal standards be applied fairly and uniformly across the nation. This Court should grant review to resolve the conflict on this important legal issue.

B. This Case Presents The Court With An Opportunity To Clarify The Due Process Requirements For Post-Verdict Scrutiny of Punitive Liability Verdicts.

This Court has held, in cases challenging the size of punitive damages verdicts, that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment." *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996); see also *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 420, 423 (1994).

Respondent counters that these decisions are inapplicable here, because the Ninth Circuit agreed that the punitive damages verdict returned against Aetna ($16.5 million) was excessive and ordered a remittitur. See Pet. App. 40a-41a. But the fundamental principles of due process articulated by this Court — which require notice before *any* punishment is imposed — apply regardless of the amount of the monetary punishment imposed pursuant to a mere remittitur.

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[3] (...continued)
is fact-bound, even though an erroneous *application* of the correct legal standard of *de novo* appellate review. Aetna's decision not to raise this issue simply shows that Aetna is not, as respondent maintains (Opp. 20-23), seeking to raise any fact-bound issues for review.

In this case, the district court reviewed the evidence and found the record insufficient to impose *any* punitive liability on Aetna. As we explained in the Petition (at 24-26), the Due Process Clause counsels special deference before an appellate court may re-impose punishment that the trial judge found unwarranted.

The case thus presents the Court with the opportunity to address an important constitutional question raised by its previous punitive damages opinions but never squarely addressed.

C. The Court Of Appeals Erred In Not Remanding The Case For Clarification Of The District Court's New Trial Order.

Respondent's opposition to review of the third issue presented relies, in large measure, on a mischaracterization of Aetna's argument. Aetna does not contend that this Court should adopt an "inflexible rule always requiring an appeals court to remand for clarification when the district court does not explain" the grounds for its conditional new trial order. Opp. 29. Instead, Aetna urges a limited rule requiring a remand for clarification only when there is fair doubt about the grounds on which the district court relied and the appellate court only addresses and overrules a single ground. This is the settled practice in other circuits (see Pet. 29).

In this case, as we demonstrated in the Petition (at 27-29), the trial court's explanation of its reasons for a conditional new trial was adequate under Fed. R. Civ. P. 50(c)(1). If the explanation was not adequate, however, the Ninth Circuit erred in failing to remand the case and thereby created a conflict in the circuits on the necessity of a remand in this situation.

The court of appeals compounded its legal error by "inferring" a solitary ground for the new trial order among those relied on the trial court, and then finding that this

ground — the trial judge's view that the evidence was legally insufficient — was legally erroneous. If the appellate court was right that the trial judge had not adequately described his reasons for granting relief, the court could not perform its review function without ascertaining why the judge had entered the order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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